

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 149.

SARGEANT & LAHR, CHARLES SARGEANT, FRANK A.
LAHR, AND MRS. FRANK A. LAHR, PLAINTIFFS IN
ERROR,

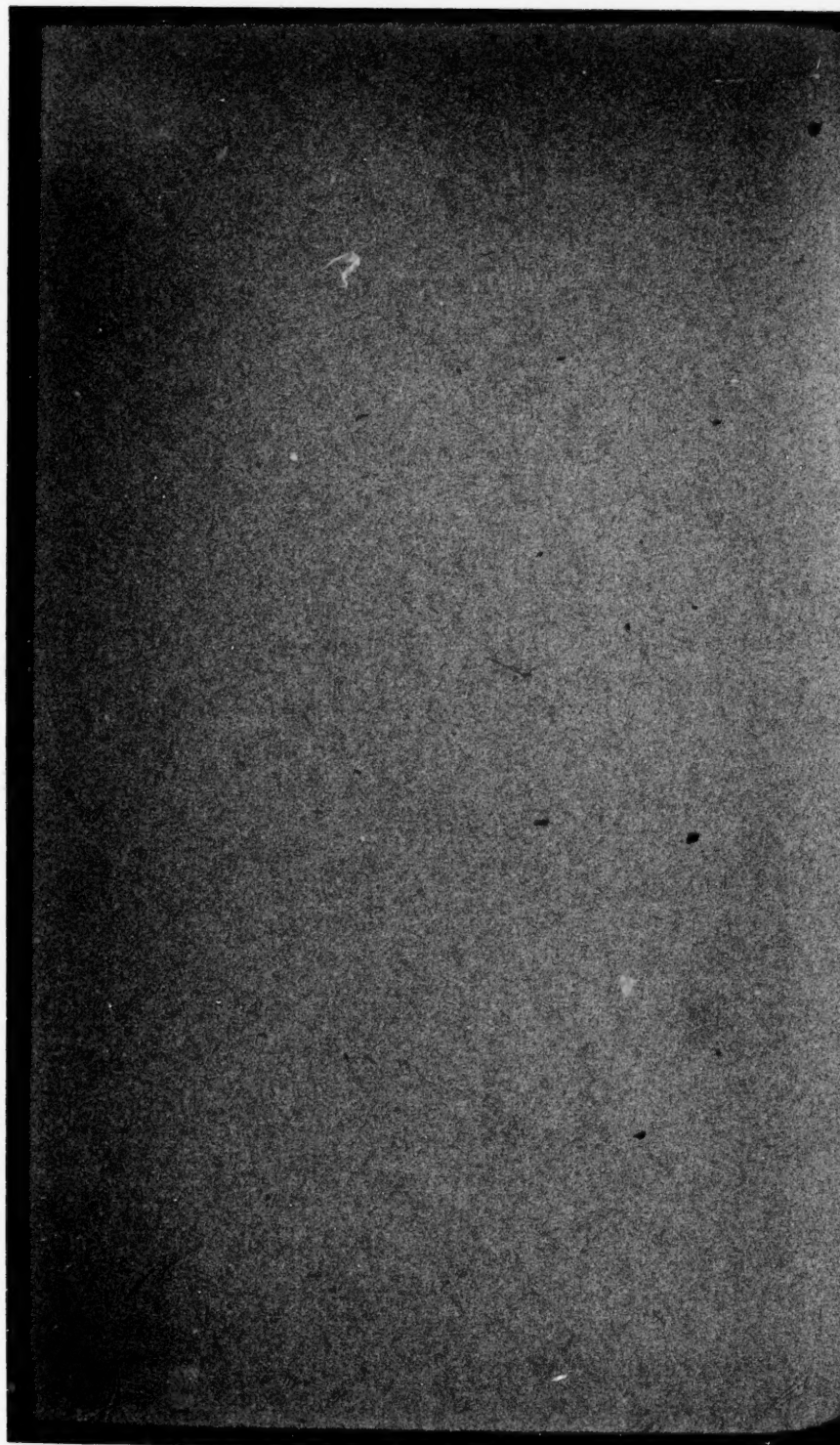
vs.

HERRICK AND STEVENS, O. E. HERRICK, D. B. STEVENS,
JOHN WATSON, AND MRS. JOHN WATSON, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED FEBRUARY 11, 1900.

(21,511.)



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1 Due, legal and timely service of the within abstract and notice of Oral Argument accepted and copy thereof received, this — day of June, A. D. 1907.

_____,
Attorneys for Appellees.

In the Supreme Court of Iowa, September Term, A. D. 1907.

HERRICK and STEVENS, C. E. HERRICK *and* D. B. STEVENS; JOHN WATSON and Mrs. WATSON, His Wife, Plaintiffs and Appellees,
vs.

SARGEANT and LAHR, CHARLES SARGEANT and F. A. LAHR, and Mrs. F. A. LAHR, Defendants and Appellants.

Appeal from the Clay County District Court.

Hon. A. D. Bailie, Judge.

F. H. Helsell, Attorney for Appellees.
Healy & Healy, Attorneys for Appellants.

Appellants' Abstract of Record.

EXHIBIT "A."

2 On the 6th day of March, 1903, the plaintiffs filed their

Petition.

in the office of the Clerk of the District Court of Clay County, Iowa, said petition being as follows:

Paragraph 1. That they are the owners at law and equity of the east half of the southeast quarter of section 11, township 94, north, range 35 west of the 5th P. M., Iowa, and that the defendants make some claim in and to said lands adverse to the estate of the plaintiffs therein, which claim is a cloud upon the absolute title of these plaintiffs which they now hold.

Wherefore the plaintiffs ask that their right and title in and to said lands may be established and confirmed in them and against the claims of the said defendants or either of them or those holding under them and that said defendants may be barred and forever estopped from having or claiming any right title or interest in and to any part of the said lands adverse to the estate of either of the plaintiffs herein, and that the plaintiffs may have further equitable relief and costs of this action. (Duly verified.)

To said petition, the defendants answered, denying every averment contained therein and asking affirmative relief against the plaintiffs, the defendants claiming that they were the absolute and

unqualified owners of the premises described in plaintiffs' petition and further praying that their title may be confirmed and quieted as against the plaintiffs.

On the 9th day of September, 1904, the plaintiffs filed an amended and substituted petition which is as follows:

Amended and Substituted Petition in Equity.

3 Come now the plaintiffs in the above entitled action and ask leave of the court to file and file this their amended and substituted petition in equity, and say:

Paragraph 1. That on the 13th day of June, 1902, and until after this action was commenced, John Watson and Mrs. John Watson, his wife, were the owners in fee of the East $\frac{1}{2}$ of the Southeast $\frac{1}{4}$ of Section Eleven, Township Ninety-four, Range Thirty-five, West of the fifth P. M. Iowa, subject only to the contract hereinafter set out.

Par. 2. That on or about said date of June 13th, 1902, John F. Watson and Eva Watson, C. E. Herrick and D. B. Stevens, entered into a certain contract in writing for the conveyance of said real estate, by which said John F. Watson and wife agreed to sell said property to the said C. E. Herrick and D. B. Stevens. That said contract was entered into, made, and executed on or about the 13th day of June, 1902, and a true copy thereof is hereto attached, made a part thereof, and marked Exhibit "A".

Par. 3. That at the time referred to in last paragraph, and at all times until this suit was begun, the plaintiffs, John Watson and wife, were in open, notorious possession of said land, using and occupying and claiming the same as a homestead. That on or about February 26th, 1903, in contemplation of the fulfillment of the contract Exhibit "A", it appearing that the title to said land was not entirely satisfactory to the said C. E. Herrick and D. B. Stevens, said plaintiffs entered into the mutual additional and supplemental contract in writing as shown by a true copy thereof which is hereto attached, made a part hereof, and marked Exhibit "B", in pursuance with which contract this action was brought. And the plaintiffs aver that John Watson and Mrs. John Watson, plaintiffs, were the owners in fee of said land, subject to the contract set out, and

4 that the other plaintiffs are the equitable owners thereof, and have an interest in the same as shown by said contract set out. And the plaintiffs say that the defendants and each of them make some claim in and to said lands adverse to the estate of the plaintiffs' claim in and to said lands and the plaintiffs aver that the defendants have no such interest in said land, although they make claim thereto, and that any alleged claim or interest in said land is inferior and of no avail and void as against the claims of the plaintiffs.

Wherefore the plaintiffs ask that the right and title of the plaintiffs in said land be established and confirmed and determined, and that the title to said land be established and confirmed as alleged

herein, and as against any and all claims of either or all of the defendants and each of them, and that the defendants and each of them be barred and estopped forever from having or claiming any right, title or interest in or to said land adverse to the claims of the plaintiffs as herein set out, and that the plaintiffs have such further legal and equitable relief as the court may grant.

(Duly verified.)

EXHIBIT "A."

(Copy.)

Land Contract.

This Agreement, made this 13th day of June in the year 1902 between John F. Watson and Eva Watson (his wife) of Clay County, and State of Iowa, party of the first part, and C. E. Herrick and D. B. Stevens of Buena Vista County, State of Iowa, party of the second part, Witnesseth, that in consideration of the stipulations herein contained and the payments to be made as hereinafter specified, the first party hereby agrees to sell unto the second party.

5 The East half of the South East quarter of Section No. Eleven (11), Township No. Ninety-four (94), North of Range No. Thirty-five (35), of Fifth P. M., being in Clay County, Iowa, containing, according to the United States Survey Eighty acres, be the same more or less, for the sum of Two Thousand and Twenty Dollars, on which the said second party hath paid the sum of One Hundred Dollars, being — Dollars principal, and one year's interest in advance at — per cent per annum. And the said second party, in consideration of the premises, hereby agrees to pay the said first party at Marathon, Iowa, the following sums of principal and interest, at the several times named below:

March 1st, 1903, \$900.00.

First Party to assume a mortgage of \$1020.00. Possession to be given March 1st, 1903. The above land to be conveyed free of all incumbrance and liens excepting the above Mortgage of \$900.00.

And it being mutually understood that the above premises are sold to said second party for improvement and cultivation, the said second party hereby further agrees and obligates their heirs and assigns that all improvements placed upon said premises shall remain thereon, and shall not be removed or destroyed until final payment for said land; and further that they will punctually pay said sums of money above specified, as each of the same become due; and that they will regularly and seasonably pay all such taxes and assessments as may be lawfully imposed upon said premises.

6 In case the said second party, their legal representatives or their assigns, shall pay the several sums of money aforesaid punctually, and at the several times above limited, and shall strictly and literally perform all and singular their agreements and stipulations aforesaid, after their true tenor and effect then the first party will make unto the second party their heirs and

assigns (upon request and surrender of this contract), a deed conveying said premises in fee simple, with the ordinary covenants of warranty.

But in case the second party shall fail to make the payments aforesaid, or any of them punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of — agreements and stipulations aforesaid, strictly and literally, without any failure or default, the times of payments being of the essence of this contract, then the first party shall have the right to declare this contract null and void, and all rights and interests hereby created or then existing in favor of said second party, or derived under this contract shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in said first party (without any declaration or forfeiture, or re-entry, or without any other act by said first party to be performed and without any right of said second party for reclamation or compensation for moneys paid or improvements made), as absolutely, fully, and perfectly as if this contract had never been made. If, however, the said first party shall elect not to declare this contract null and void in case the second party shall fail to make the payments, or any of them as above stipulated, the second party agrees to pay interest at the rate of eight per cent per annum on all payments of both principal and interest from the date of their maturity. And — is further stipulated and agreed that no assignment of the premises shall be valid unless the same shall be endorsed hereon, or permanently attached hereto, and countersigned by the first party, and that no agreement, or relations between the second party and their assigns, or any other person acquiring title or interest from or through them, shall preclude the first party from the right to convey to said second party or their assigns on the surrender of this agreement and the payment of the unpaid portion of the purchase price which may be due to the first party.

In witness whereof, the said parties have hereunto signed their names on the day and first above written, to these presents in duplicate.

JOHN F. WATSON.
EVA WATSON.
C. E. HERRICK.
D. B. STEVENS.
By C. E. HERRICK.

EXHIBIT "B."

(Copy.)

WEBB, IOWA. *Febr'y* 26, 1903.

This agreement between John F. Watson and wife, of the first part, and C. E. Herrick and D. B. Stevens of the second part is to this effect.

That the contract between the parties for the sale of the east half of the southeast quarter of Sec. 11, Twp. 94 N., Range 35, W. of

5th P. M. made June 13th, 1902, shall stand and bind the said parties; and this contract shall be supplemental thereto. It is further agreed that F. C. Gilchrist shall quiet title to said land so as to make it satisfactory and that said parties shall share the costs and expenses thereof equally, and when so quieted said contract of June 13 shall be completed at once and deed passed, and possession given and money paid. In the meantime Watson may have possession, but second parties shall pay no interest on purchase money. If title cannot be made within a reasonable time second parties may at their option have the land, or a return of money paid, and no damages can be asked by them against Watson.

8 The tenant to whom second parties have rented shall be satisfied by parties hereto, any expense therefor to be shared equally.

First party shall have the benefit of crop that may be planted at the time of perfecting title.

JOHN F. WATSON.

EVA WATSON.

C. E. HERRICK.

D. B. STEVENS.

By C. E. HERRICK.

Immediately upon the filing of said amended and substituted petition, John F. Watson and his wife, Eva Watson filed in the office of the Clerk of the District Court of Clay County, Iowa, the following.

Dismissal.

In the District Court of the State of Iowa in and for Clay County.

JOHN WATSON and Mrs. JOHN WATSON, C. E. HERRICK & D. B. STEVENS, Plaintiffs,

vs.

CHARLES SEARGENT and F. A. LAHR and Mrs. F. A. LAHR, Defendants.

Dismissal.

Comes now, John Watson and Mrs. John Watson, plaintiffs in the above entitled cause and hereby dismiss this cause in so far as they are plaintiffs herein, and we further aver that we never authorized the institution of this suit nor the use of our names as plaintiffs herein, and we claim no interest in the South half of the South West Quarter of Section (11) Eleven, Township (94) Ninety-four, Range (35) Thirty-five, West of the Fifth P. M. Iowa. And we have claimed no interest in said premises since March 3, 1903, the day that we executed a warranty deed to Charles Sargent and F. A. Lahr for said premises.

(Signed)

(Signed)

JOHN WATSON.

Mrs. JOHN WATSON.

STATE OF WISCONSIN,
Barron County, ss:

We, John Watson and Mrs. John Watson on oath say that we are plaintiffs in the foregoing cause of action and the statements contained in the foregoing dismissal are true and correct.

(Signed)
(Signed)

JOHN WATSON,
Mrs. JOHN WATSON.

Subscribed and sworn to before me by John Watson and Mrs. John Watson, this 13th day of August, 1903.

[SEAL.]

(Signed)

A. F. WRIGHT,

Notary Public in and for Barron Co., State of Wisconsin.

After the filing of the said dismissal by the said John Watson and his wife Mrs. John Watson, who were named as plaintiffs, the remaining plaintiffs C. E. Herrick and D. B. Stevens filed the following

Amendment to the Substituted Petition.

Come now the plaintiffs, C. E. Herrick and D. B. Stevens, and upon the record after the filing of the attempted dismissal by John Watson and wife, ask leave of the court to file this amendment to their substituted petition, and ask that said John Watson and Eva Watson his wife, be hereby made parties defendant in this action and they show the Court from the record that the Court has jurisdiction of the persons of said John Watson and Eva Watson, and of the subject matter involved in this case. And they further
10 state that this action was prosecuted and brought by the plaintiffs as shown by the records and was authorized to be brought by said defendants John Watson and Eva Watson. That after said cause had been legally brought under and by virtue of their authority, by collusion and fraud between said John Watson and Eva Watson and the defendants Seargent & Lahr, and at a time when and after said defendants Sargeant Lahr and John Watson and wife had full personal and actual knowledge of the contract set out in the petition running to these plaintiffs, and the rights thereunder secured, the defendants Sargeant & Lahr fraudulently and in collusion with the defendant John Watson and wife procured an alleged deed from said Watson and wife to the premises described to the defendants Sargeant & Lahr, and procured the dismissal, so called, filed in this cause this day. That said dismissal and said deed were obtained between the parties now named as defendant collusively, fraudulently, with full knowledge on the part of all of them of the rights of these defendants, and for the purpose and with the intent to defraud Herrick & Stevens, and to prevent the performance of the contract set out in the petition, and to secure the premises described to Sargeant & Lahr fraudulently and without adequate consideration, and in order to complete the perpetration of said fraud said Sargeant & Lahr caused the defendants Watson and wife and procured them to leave the State of Iowa, and to go to Wisconsin,

and only after they had so removed did they pay Watson and wife anything on said deed or in consideration of the perpetration of said fraud. Plaintiffs aver that upon the filing of the dismissal in this case was the first time they had knowledge of the intended fraud in the conduct of said cause by said parties, and the plaintiffs state further that if it be held that Watson and wife are not the holders of the legal title, that they are in fact the owners of the equitable

11 title to the land described, subject to the contract with these plaintiffs. And the plaintiffs ask in addition to the other relief asked that the alleged deed from Watson and wife to Sargeant & Lahr be held to be fraudulent and void and of no force and effect as against the claims of the plaintiff. That the same be annulled and set aside and cancelled of record, and that the rights of all these parties, plaintiff and defendant be ascertained and determined by this Court of Equity, and that the plaintiffs be permitted to pay the amount shown to be due upon their contract which they hereby tender in court, and that thereupon that the title be quieted, established and confirmed in the plaintiffs, and that the defendants Charles Sargeant and F. A. Lahr and Mrs. F. A. Lahr be ordered to make, execute and deliver to the plaintiffs deed conveying all their interest in said property, and in the event of their failure so to do for thirty days the clerk of this court be appointed a commissioner to make, execute and deliver a deed which shall convey all the interest of John Watson and wife and Sargeant and Lahr and wife, to the plaintiffs, and that the plaintiffs recover all costs of this cause and relief as demanded originally. In the event the court should hold that it does not have personal jurisdiction of Watson and wife, the plaintiffs ask that this cause be continued at the costs of Watson and wife, and that the cause be continued upon the record as it stands to give the plaintiffs time to secure service of notice upon said defendants.

(Duly verified).

To the said Substituted petition as amended above, the defendants filed their

Answer, Cross Petition, Cross Bill and Counter Claim,

as follows:

12 Come now the above named defendants, and answering the amended and substituted petition in equity and amendments thereto of the plaintiffs, and as a cross petition, cross bill and counter claim, state to the court:

First Defense.

Paragraph 1. They deny each and every statement, averment and allegation specifically contained in paragraph 1 of said petition.

Paragraph 2. These defendants deny specifically each and every averment, statement and allegation contained in paragraph 2 of said petition.

Paragraph 3. These defendants deny each and every statement, averment and allegation contained in paragraph 3 of said petition,

except these defendants admit that they are the owners of the premises described in said petition.

Paragraph 4. The defendants specifically deny that the plaintiffs are the equitable owners of said premises and further state to the court that said plaintiffs, C. E. Herrick and D. B. Stevens have no warrant, authority or right to prosecute this claim to quiet title against the defendants in this case, because the said last named plaintiffs neither have or claim to have any right, title or interest in and to the above described premises, either legal or equitable.

Paragraph 4. Answering the 3rd paragraph of plaintiffs' petition, these defendants specifically deny that said premises described therein was the homestead of John Watson and his wife on the 26th day of January, 1901.

Second Defense.

Paragraph 1. These defendants further state to the court that the plaintiffs claim to have derived some interest in the above described premises by virtue of a tax deed, bearing date the 26th of September, 1878, issued and executed by the treasurer of Clay County, Iowa, to one W. L. Simmons, and that said treasurer of said county sold the above described premises for taxes in the year 1875, and that the plaintiffs only claim said interest in said premises by virtue of the execution and delivery of said tax deed and not otherwise. But these defendants show unto the court that in 1857, one Hartzell J. Schaffer located the said above described premises with a certain military bounty warrant, and that under and by virtue of the laws of the United States no tax of any kind could be laid or asserted by the order or under the authority of the State of Iowa, or of any county, township or other municipal corporation, existing under or by virtue of the laws of the State of Iowa or of any other state for any purpose whatever against said above described premises until three years had elapsed after the issuance of a patent by the United States Government to and for the above described premises.

Paragraph 2. That no patent had been issued by the United States Government to or for the above described premises or no patent was issued at the time said tax deed was executed and delivered and at the time the taxes for which said premises were sold was laid and levied upon and against said premises and these defendants aver the fact to be that not until the year 1904, was a patent issued by the United States Government to or for said above described premises, and that in said year 1904, the United States Government issued and delivered a patent and for the above described premises to one Amos Stanley who was the assignee of the said Hartzell J. Schaffer, who originally entered and located said land under said military bounty warrant.

Paragraph 3. And the defendants further aver that said tax deed, executed and delivered by the treasurer of Clay County, Iowa, in the year 1878 to one W. L. Simmons was absolutely void and of no force whatever.

Paragraph 4. The defendants further aver that the defendants

14 Charles Sargeant and F. A. Lahr are now the absolute and unqualified owners of the above described premises, that their title to said premises is derived by virtue of the original entry and location made by the said Hartzell J. Schaffer on and upon said described premises under and by virtue of said military bounty warrant and by the assignment of said Schaffer of said warrant and bounty and of all rights thereunder to Amos Stanley, and by virtue of a patent executed by the United States Government in the year 1904, to Amos Stanley, and by virtue of a warranty deed executed by Amos Stanley and wife to S. B. Landt, and by the said S. B. Landt and his wife to one Hiram Balliett, and by the heirs and devisees of the said Hiram Balliett and by other mesne conveyances from the United States Government to Hartzell J. Schaffer and Amos Stanley and other grantees.

Third Defense.

As another separate and further defense these defendants aver and state to the court:

Paragraph 1. That several months prior to January, 1901, the said John Watson and his wife Eva Watson who are sometimes known as the defendants and other times known as the plaintiffs in this case, made, executed and delivered to the defendants Charles Sargeant and F. A. Lahr a certain written contract for the conveyance of the East one-half (E. $\frac{1}{2}$) of the South-east Quarter (S. E. $\frac{1}{4}$) of Section Eleven (11), Township Ninety-four (94) North, Range Thirty-five (35) West, of the 5th P. M., Iowa, and that thereafter, to-wit, on the 26th day of January, 1901, the said John Watson and his wife Eva Watson, executed a more formal contract for the conveyance of said premises to said Sargeant and Lahr, and that last named contract was duly filed for record and recorded in the office of the recorder of Clay County, Iowa, on the 28th day of January, 1901, and recorded in Book No. 10, page 149 therein, and

15 that thereafter in ratification, adoption approval pursuant and in consequence of said contract, the said John Watson and his wife Eva Watson executed a warranty deed on March 3, 1903, which deed was recorded on March 3, 1903, in deed Record No. 13, at page 63 in the office of the recorder of Clay County, Iowa, and these defendants at all times from and after January 26, 1901, and at all times from and after March 3, 1903, have been in the open, notorious and public use and occupancy of said premises, both by themselves and by their tenants who occupied, lived upon and cultivated the same.

Fourth Defense.

The defendants as another, further and different defense state to the court:

Paragraph 1. That these plaintiffs, to-wit, C. E. Herrick and D. B. Stevens claim to have derived an interest or property in the above described premises on June 13, 1902, by virtue of a written contract which is set forth in their petition herein, but these defendants show

to the court that they never had knowledge or notice of any kind, either actual or constructive, of the existence of said alleged and purported contract of sale, an alleged and purported copy of which is set forth in plaintiffs' petition, and that thereafter, to-wit, on March 3, 1903, for a good and valuable consideration, and without any notice, either actual or constructive, of the existence of said alleged and purported contract set forth in said petition aforesaid, purchased said premises above described from the said John Watson and Eva Watson, and paid a good and valuable consideration at said time to said John Watson and Eva Watson for the above described premises without having any notice or knowledge of any kind that the said C. E. Herrick and D. B. Stevens had, claimed or pretended to have or claim any right, property, interest or claim in and to the above described premises, either adverse to these defendants or to the said John Watson and his wife Eva Watson.

Paragraph 2. Defendants further state to the court that said alleged and purported copy of a certain written agreement set forth in plaintiffs' petition and marked Exhibit "A", which the said Herrick and Stevens claim was executed on the 13th day of June, 1902, by the said John Watson and his wife, Eva Watson and the said Herrick and the said Stevens, copy of which is marked Exhibit "A" and made a part of plaintiffs' petition was never recorded in the office of the recorder of Clay County, Iowa, said above described premises being located and situated in said Clay County, Iowa.

Paragraph 3. The defendant further states to the court that a contract, a purported copy of which is set forth in plaintiffs' petition and marked Exhibit "B", was never recorded in the office of the recorder of Clay County, Iowa, and that on March 3, 1903, these defendants had no knowledge either actual or constructive of the existence of said contract, or that the said Herrick and said Stevens claimed any right, interest or property in said premises against these defendants or against the said John Watson and his wife Eva Watson, by virtue of the existence and alleged execution of said contract, and that thereafter, to-wit, on March 3, 1903, for a good and valuable consideration they purchased said premises from the said John Watson and Eva Watson, without notice or knowledge of any kind either actual or constructive, of the existence of said contract, or of any rights or claim of the said Herrick and the said Stevens under or by virtue of the same.

Paragraph 4. These defendants show to the court that by reason of the matters and allegations heretofore set forth in this defense and that by reason of the failure of the said Herrick and the said Stevens to record in the office of the recorder of Clay County, Iowa, said contract, copies of which are marked Exhibits "A" and "B" of said petition, that said instruments are of no validity, force or effect as against these defendants who were subsequent purchasers for a valuable consideration, without notice or knowledge of the existence of said contracts, or the alleged or purported claims or rights of the said Herrick and the said Stevens under the same.

Fifth Defense.

Paragraph 1. These defendants further show unto the court:

That the said Herrick and the said Stevens are barred and estopped to assert or claim any right, interest or property against these defendants in and to the said above described premises by reason of their negligence, neglect, failure and laches to assert said claim, and that they are estopped from making, asserting or pretending to make, assert or have any claim, right or property in and to the above described premises against these defendants by virtue of any alleged or purported rights under the terms of the contracts, copies of which are alleged and purported to be set forth in their petition herein, because said Herrick and said Stevens knew that the said Watson and his wife Eva Watson were about to convey and sell said above described premises to these defendants pursuant and under the terms of the contracts heretofore referred to as being made and executed by the said Watson and his wife, Eva, to defendants, Charles Sargent and F. A. Lahr, and the said Herrick and the said Stevens knew that the said Sargent and the said Lahr were about to pay and did pay a good and valuable consideration to the said Watson for said above described premises and raised or made no objection or protest thereto and failed, refused and neglected to assert or make any claim in and to the above described premises, either as against the said Watson and his wife, or as against these defendants.

Sixth Defense.

These defendants, as another, further and separate defense, state to the court:

Paragraph 1. That on and prior to the 13th day of June, 1902, the said Herrick and Stevens had both actual and constructive notice and knowledge of the existence, execution and validity of a certain contract made by the said Watson and his wife and by the said Watson, which contract is recorded in Book 10, page 149, in the office of the Recorder of Clay County, Iowa, which is heretofore referred to and notwithstanding such knowledge, entered into negotiations and conversations with the said Watson and his wife, Eva Watson, respecting and concerning the sale by said Watson and his wife of said premises, and that prior to the execution of said contract, copy of which is marked Exhibit "A", it was agreed and understood by and between the said Herrick and the said Stevens and the said Watson and his wife, Eva Watson, that said contract, copy of which is marked Exhibit "A", would be of no force, effect and validity and would not become operative and no rights of any kind could be based and predicated thereon, either for and in behalf of the said Herrick and the said Stevens, or for and in behalf of the said Watson and his wife Eva Watson, unless the said Sargent and Lahr these defendants, should disclaim all right, title and interest under the terms of said contract made on January 26, 1901, by the said Watson and his wife and by the said Watson to the said Sargent and Lahr.

Paragraph 2. These defendants aver the fact to be that at all times from and after January 26, 1901, the said Sargent
19 and Lahr asserted, claimed and maintained their right, title and property in said premises under and by virtue of said contract of date January 26, 1901, and the said contract made by the said Watson and his wife some six months prior to the said January 26, 1901, and that by reason of the continued assertion, claim and title of the said Sargent and the said Lahr to the said above described premises, said contract, copy of which is marked Exhibit "A" never became effective or operative and the condition precedent to the validity and effectiveness of said contract never happened or occurred and that said contract, copy of which is marked Exhibit "A" is therefore null and void and of no force or effect.

Paragraph 3. The defendants further show unto the court that the signing of said contracts, copies of which are alleged to be Exhibits "A" and "B" attached to the petition of the plaintiff was caused, induced and forced by and in behalf of the said John Watson and his wife Eva Watson, through the loud, vulgar and obscene talk, profanity, cursing and swearing of the said C. E. Herrick and through the threats of the said C. E. Herrick to have confined in prison and in jail the said John Watson, and by other various and divers threats to punish, annoy and harass the said John Watson and his wife Eva Watson.

Paragraph 4. And these defendants aver the fact to be that the mind and will of the said John Watson and his wife Eva Watson were overcome by the conduct, conversation, talk and threats of the said C. E. Herrick to punish, prosecute and arrest the said John Watson and his wife Eva Watson, and the said Watson and his wife believed that the said Herrick and the said Stevens would execute and fulfill his threats as aforesaid, and thus overcome the will and minds of the said Watson and his wife, Eva Watson, and caused, persuaded and induced the signing of said contracts as aforesaid, and that the signing of said contracts by the said
20 Watson and his wife, Eva Watson, was not the voluntary act and deed of the said Watson and his wife, Eva Watson, but was induced and caused by the fear aroused and excited in them by the said unlawful, ferocious threats, conversation and conduct of the said Herrick and the said Herrick and Stevens, and that by reason thereof said contracts are of no force, effect or validity whatever.

Counter Claim, Cross Bill and Cross Petition.

The defendants Sargent and Lahr, Charles Sargent and F. A. Lahr, as affirmative relief against the plaintiffs, show unto the court that they are credibly informed and verily believe that the plaintiff C. E. Herrick and D. B. Stevens assert and claim some title, right, interest or property adverse to these defendants.

That these defendants aver the fact to be that they are the absolute and unqualified owners of said above described premises.

They therefore ask that their title in and to the said above

described premises may be established and confirmed as against the rights and claims of the plaintiffs herein.

Wherefore, these defendants pray that the petition and complaint of the plaintiff- may be dismissed, and that their title, right and property in and to the above described premises may be established and confirmed as against all claims, rights, title or property which the plaintiffs allege they own or pretend to own or claim in and to the above described premises, and that the said plaintiffs may be forever barred and estopped from having or claiming any right, title or interest in and to the above described premises hostile or adverse to the title, property, claim and ownership of the defendants in and to the above described premises, and for such other, further or different relief as may be agreeable to equity.

(Duly verified).

21 To said pleading of the defendants above set forth, the plaintiffs thereafter filed their

Answer to Cross-Petition.

Come now the plaintiffs in the above entitled action, and for answer to the cross petition filed in this cause by the defendant, say, that they deny each and every allegation of the same not in this answer admitted.

Paragraph 2. They further say that any right or claim of title to or interest in the premises on the part of the defendant arose by and by virtue of an agreement between John Watson and Sargent and Lahr, which had been wholly abandoned and declared for naught, rescinded and disclaimed at the time that plaintiffs C. E. Herrick and D. B. Stevens secured the contract attached to the petition, by copy. That although the defendants had secured an alleged contract for the right to purchase said land, that the same was signed only by John Watson, and was for the homestead of said Watson and was not signed by his wife, and that before the purchase of said land by said plaintiffs Herrick and Stevens the defendants Sargeant and Lahr had disclaimed, abandoned and declared to the plaintiffs their entire abandonment and disclaimer of the said contract, of which the plaintiffs do not have a copy and cannot for that reason attach the same by copy or original to this answer. That said abandonment was by the said defendants orally declaring that they made no claim thereunder and that they would quit claim all their interest thereunder to the plaintiffs, and that they claimed no rights therefrom but after said abandonment as aforesaid, the plaintiffs, and each of them, relying upon the statements of the defendants, and relying upon the fact that some months had elapsed since the contract referred to between said Watson and Sargeant and Lahr had matured and they had done nothing except to disclaim the

22 same in fulfillment thereof, and plaintiffs allege that only and by virtue of said contract do the defendants have any right, title or interest or claim upon said premises anterior to any claim of the plaintiffs. And plaintiffs allege that by reason of said disclaimer and abandonment and cancellation of said contract, the

defendants have no claim or title to said land as against the claims of the plaintiffs, and that said defendants are estopped to deny by reason of their statements and acts as aforesaid the claims of the plaintiffs, which were secured by said Herrick and Stevens relying upon the statements and conduct of the defendants, and induced thereby to enter into contract set out in the petition, and induced thereby to pay the money provided for under said contract.

Plaintiffs say that any right, title or interest acquired by these defendants in said land were acquired with full and complete actual notice that prior thereto the plaintiffs had such rights as are set out in the petition.

Wherefore the plaintiff ask that the cross-petition of the defendant be dismissed at their cost, and for the relief prayed for in the petition. (Duly verified).

Thereafter the defendants filed their

Reply to Cross-Petition

as follows:

They deny specifically each and every averment and statement contained in said answer, except what is hereinafter specifically admitted.

These defendants make a part of this reply each and every averment and allegation set forth and contained in their answer, cross bill and counter claim filed herein, with the same force, effect and validity as though the same were set forth in full in this reply.

23 Replying to the second paragraph of said answer to cross petition, these defendants specifically deny each and every averment and allegation therein contained, except what is herein-after specifically admitted, and further state to the court:

That prior to the alleged and purported execution and signing of the contracts set forth in plaintiffs' petition, by the original plaintiffs herein, the plaintiffs C. E. Herrick and D. B. Stevens had both actual and constructive knowledge and notice of the existence of the contract made by the said Watson and his wife, Eva Watson, and by the said Watson, of date January 26, 1901, and the said Herrick and the said Stevens were at said times informed and told by these defendants that the said defendants would not release or forfeit their right and title in and to said premises existing by virtue of said contract of date January 26, 1901, and of said prior contract.

These defendants aver the fact to be that at all times after the execution and signing of said contract of date January 26, 1901, they made repeated and continued efforts to perfect said title in a manner satisfactory to themselves, and at all times from and after the 26th day of January, 1901, and from and after six months prior to said time until said premises were finally conveyed by the said John Watson and his wife, Eva Watson on January 13, 1903, claimed and asserted their rights, title, interest and property in said premises and owned the same at all times aforesaid.

Further replying to the said answer, these defendant- state:

That said contract of date January 26, 1901, contained a clause "party of the first part agrees to perfect title of above piece before

March 1, 1902, as there is now an imperfect title to same unless same is perfected party of the first part has it or not at their option."

These defendants aver the fact to be that long prior to March 1, 1902, they elected to exercise said option to keep said contract in full force and effect and to take, buy and own said premises under and by virtue of the terms of said contract.

That in February, 1902, the said John Watson and his wife Eva Watson rented said premises for the year beginning March 1, 1902, and ending March 1, 1903, from the defendants said Sargeant and Lahr, and occupied the same during said year as the tenant and lessee of the said Sargeant and the said Lahr.

Further replying to the said cross petition, these defendants state that the premises described in plaintiffs' petition was not the home-stead of John Watson and his wife, Eva Watson on January 26, 1901, but that on said day and thereafter the said Eva Watson wife of said John Watson, adopted and ratified said contract and accepted and received from the defendants, part of the consideration contemplated and provided to be paid for under the terms of said contract, and that thereafter on March 3, 1903, in further adoption and ratification of said contract signed, executed and delivered a certain warranty deed for the above described premises pursuant and according to the terms of said contract of date January 26, 1901.

Wherefore, these defendants renew the prayer of their answer, counter claim and cross petition.

(Duly verified).

And on the 4th of April, 1905, the plaintiffs filed as an

Answer to Defendant's Cross Petition and Counter Claim

the following:

Come now C. E. Herrick and D. B. Stevens, and for answer to the cross petition, cross bill and counter claim of the defendants filed Jan. 11, 1905, says,

Division I.

They deny each and every allegation contained therein not in their petition and amendment of this answer admitted.

Division II.

These plaintiffs admit that they claim to be the owners, or have, an interest in said real estate by reason of a tax title by which the title hereby became vested in these plaintiffs.

They admit that one Hartzell J. Shaeffer located upon said premises under a certain military bounty warrant.

They admit that no patent actually issued on said land until the year 1904.

They say that on or about June 15, 1857, Hartzell J. Shaeffer located by military warrant upon the land described, and he and

his assignees did everything that was legally necessary to entitle them to a patent, so that they obtained an equitable ownership and interest in said lands, making the same subject to taxes for the year 1873 and years thereafter.

That a tax deed was legally issued Sept. 26, 1878 for said lands under sale of Jan. 5, 1875 for the taxes for the year 1873.

That the grantor in a contract named in the petition, John Watson, was at the time of making the contract with these defendants, originally set out in the substituted petition, the grantee of the title under said tax deed, and also of the title of Hartzell J. Shaeffer, original locator, and also the grantee of all the interest of said parties herein named.

These plaintiffs admit that on or about Jan. 26, 1901, a certain contract of conveyance of said land was made by said John Watson to the defendant Sargeant & Lahr.

26 That notwithstanding said contract, the defendant Sargeant & Lahr failed to pay the amount due thereunder, and these plaintiffs in conversation with said defendants and said John Watson and wife, were informed by them all that said contract from Watson to Sargeant and Lahr was canceled and abandoned, and that said Sargeant & Lahr were released therefrom. And these plaintiffs were informed by said Sargeant & Lahr that they made no claim whatever under said contract, and that they were willing that Watson and wife should contract and sell said land to these plaintiffs.

That they said Sargeant & Lahr would, if desired, deed whatever interest they had in said land of said John Watson in release of said contract.

That believing said statements made by said Sargeant & Lahr, these plaintiffs entered into the contract set out in the amended and substituted petition and made payments for said land to said John Watson, and were induced so to do by the conduct and representations as aforesaid, and the statements made by Sargeant & Lahr to these plaintiffs that they had canceled and abandoned and made no claim under said contract. And the plaintiffs state that by reason of the aforesaid conduct and statements of Sargeant & Lahr, being induced thereby to part with their money and to enter into the contract sued upon with John Watson, said Sargeant & Lahr are now estopped to deny the title of the plaintiffs, and have waived any and all rights under said contract made by Watson to them.

And the plaintiffs aver that notwithstanding said representations and their abandonment of their contract on or about Mar. 3, 1903, Sargeant & Lahr, with full knowledge and actual notice that said Watson and wife had contracted to sell said land to these plaintiffs, collusively and fraudulently entered into a fraudulent arrangement

27 with said John Watson and wife, and induced said John Watson and wife to execute a warranty deed to the defendants of said date, which was filed for record Mar. 3, 1903, and recorded in Book "13", on page —. And plaintiffs aver that at the time of the making of the said deed and as a part of said transaction, said Sargeant & Lahr were informed by Watson and wife that he had given the plaintiffs the contract aforesaid, and said Sargeant &

Lahr, notwithstanding the representations that they had made and the fact that said Watson and wife had given the contract aforesaid to these plaintiffs, agreed with said Watson and wife that if they would give said Sargeant & Lahr a warranty deed to said premises that they, said Sargeant & Lahr, would protect Watson and wife against any and all damages he might suffer costs and expenses connected therewith, or any litigation growing out therefrom, all of which procurance of said deed and arrangement with Watson and wife was collusive, fraudulent and with actual notice of the claims of these plaintiffs as aforesaid.

And plaintiffs say further that any interest or title which the defendants Sargeant, or Sargeant & Lahr may have obtained from the heirs of Hiram Balliet were obtained after said Sargeant & Lahr had full, complete and actual notice of the claims of these plaintiffs and of the contract that they had from Watson, and that these plaintiffs had been induced and led to purchase from Watson by reason of the representations and conduct, as hereinbefore set out, of said Sargeant & Lahr, and with full notice of the contract said Watson and wife had executed to the plaintiffs as aforesaid. And the plaintiffs deny that by reason of a deed procured from said heirs, the defendants or either of them acquired any title whatever, and they say that by reason of their conduct and representations as aforesaid they were estopped to acquire title as against these plaintiffs.

And the plaintiffs say further that they deny that said 28 Hiram Balliet had at any time any title to said premises, or paid any consideration therefor. And the plaintiffs deny that the defendants or either of them acquired any title from the heirs of said Balliet or paid any actual or reasonable consideration therefor. And they say that the transfer by Amos Stanley to S. V. Landt and S. V. Landt and wife to Hiram Balliet was by mistake, without consideration, and said lands were included in conveyances to said parties by error, and without intention and by mistake and that any alleged claim that defendants have in said land by reason of said conveyances was by quit claim conveyance with full notice of all the outstanding equities thereto.

And plaintiffs aver further that when this action was begun, at the instance and request of John Watson, made to F. C. Gilchrist, Esq., an attorney who brought this action, said plaintiffs John Watson and wife were made plaintiffs to this cause; that said action was brought at his instance and request and under his direction and as a part of the corrupt and fraudulent agreement between Watson and wife and Sargeant & Lahr corrupt and without authority and to the damage and detriment, and for the purpose of defrauding the plaintiffs Herrick & Stevens, after said cause had been brought where Watson and wife were joined as parties plaintiffs, and that the procurance of the deed as aforesaid, and with a fraudulent intent to defraud these plaintiffs. Said Watson and wife permitted and attempted a dismissal of said cause as to them in still furtherance of the purpose to defraud these plaintiffs and for no other.

And these plaintiffs further say that they deny that Amos Stanley

procured a patent from the United States Government to said land, or was entitled thereto; that they say that the defendants after this suit was brought without knowledge or direction or consent of said

Amos Stanley and with pursuance of their fraudulent intent
 29 as aforesaid to defraud these plaintiffs by substitution, procured by payment of \$100 to the land department at Washington, the issuance of a patent to said Amos Stanley for the purpose of placing these defendants as alleged holders of title through Amos Stanley in a position to question the tax title relied upon and owned by said John Watson, and procured said patent from the government in furtherance of these fraudulent designs.

And these plaintiffs say that if said patent conveyed any title whatever, by relation, it becomes effective in the hands of these defendants only as of the date from which the defendants claim title, and would advantage them only by reference back to the date or within a year thereafter. Said land was subject to taxation, and the primary grantors of said defendants, Amos Stanley and wife and S. V. Landt and wife and Hiram Balliet and his heirs have failed and neglected to pay taxes on said land, and the said lands were at said date subject to taxation, and the tax title held by John Watson is a good and actual title in full force and effect as against the defendants, and all the parties through whom they claim, and these plaintiffs ask that this answer be considered an answer as against the second, third, fourth, fifth and sixth divisions of their answer as a reply thereto, and to the counter claim, cross bill and cross petition of the defendants.

Wherefore, plaintiffs pray as in their amended and substituted petition.

(Duly verified.)

And thereafter on the 30th day of September, 1905, the defendants amended their

Answer, Cross Petition, Cross Bill and Counter Claim

as follows:

Come now the defendants, Sargeant and Lahr, Charles Sargeant, F. A. Lahr and Mrs. F. A. Lahr and leave of court being
 30 first had and obtained amend their answer, cross petition, cross bill and counter claim heretofore filed in this court in the following particulars:

By adding thereto, immediately after the end of the 6th Defense, and before the words "counter claim, cross bill and cross petition" on the 8th page thereof, the following:

Seventh Defense.

These defendants, as another, further and complete defense show unto the court that on June 15, 1857, one Hartzell J. Schaffer entered with a certain military bounty warrant, the premises described in plaintiffs' petition, and that thereafter, to-wit, on the 25th day of September, 1878, the Treasurer of Clay County, Iowa, issued

a tax deed for the premises described in plaintiffs' petition to one W. L. Simmons, and that on January 5, 1873, said above described premises were sold for taxes for the year 1873, and that the sole claim right and title of the plaintiffs herein and to said above described premises is derived from the alleged and purported title, passing and created under and by virtue of the execution and delivery of said tax deed dated September 26, 1878, to the said W. L. Simmons, and these plaintiffs have and claim no other, further or different title in and to said above described premises save and except what is obtained and derived under and by virtue of the execution and delivery of said tax deed, and these defendants show unto the court that said tax deed was of no validity, force or effect because the title to said above described premises on January 5, 1875, and on September 26, 1878, and at all times, for which taxes were levied and assessed upon and against said described premises; for the recovery and collection of said taxes said premises were sold on January 5, 1875, in the United States and because the location and

entry of said land by Hartzell J. Schaffer was suspended and
 31 was not approved by the United States at the time said above described premises were listed for taxation and at the time taxes were levied and assessed against said above described premises for the recovery and collection of which taxes said above described premises were sold on January 5, 1875, and pursuant to said sale the treasurer of Clay County, Iowa, on September 26, 1878, signed, executed and delivered the certain tax deed which was filed for record on September 26, 1878, and recorded in Book K of Deeds, at page 41 in the office of the Recorder of Clay County, Iowa.

Wherefore, defendants renew the prayer of their answer, cross petition, cross bill and counter claim.

(Duly verified.)

And also on the 30th day of September, 1905, filed a

Reply to the Answer and Cross Petition of the Plaintiffs,

said reply being as follows:

Come now the defendants, Sargeant & Lahr, Charles Sargent and F. A. Lahr and Mrs. F. A. Lahr, and replying to the answer to the cross petition filed by the plaintiffs herein, deny each and every averment and allegation therein contained, except what has been heretofore expressly admitted by these defendants.

(Duly verified.)

And on the 27th day of October, 1905, the plaintiffs filed the following

Amendment to Answer to the Defendants' Cross Petition and Counter Claim, and as an Amendment to the Cross Petition of the plaintiffs, and as a Reply to the Amendments of the Defendants, Filed Since Last Term of Court,

as follows:

Come now C. E. Herrick and D. B. Stevens, plaintiffs, and as amendment as aforesaid, and by leave of court first granted, and the defendants having filed amendments and reply since this case was set for trial, and in vacation, and the plaintiffs say that in addition to the allegations of the cross petition filed by them and of their answer heretofore filed to the cross petition of the defendants, that they admit that about June 15th, 1857, the land described was entered under land warrant by one Hartzell J. Schaffer. That he was the assignee of a military warrant originally issued to one Jacob Hutson, which, about April 14th, 1856, was duly assigned to one William Maltby, and which, about February 1857 was duly assigned by a second assignment to said Hartzell J. Schaffer. That at said time said land was subject to the procurement of patent from the Government, those matters necessary to entitle the holder of the entry, who was an assignee of the military warrant and an assignee of the entry to the land, to obtain from the Government a patent by mere formal proof of assignment, and that said entry had never been canceled, and the plaintiffs say that said entry has never been canceled, and that everything was done which had to legally be done before a patent was due, and that said land was and ever since has been subject to taxation. And the plaintiffs deny the statement of the defendants' answer last filed, stating that said land was not subject at such time to taxation, and these plaintiffs say that they are the owners both of the fee title coming through the entry of said Hartzell J. Schaffer, as well as of the tax title under sale of land for taxes, by an undisputed chain of title through both said fee title and tax title, the same having been merged in their grantor.

These plaintiffs further say that on or about January, 1900, John F. Watson was the owner in fee simple of said land. That said John Watson at said time was a married man living on said land. That he and his grantors had occupied, been in the public and notorious possession of said land for more than twenty years prior thereto, and at said time occupying said land as a homestead, he executed and delivered a certain contract set out in plaintiffs' pleadings, to Sargeant & Lahr, and in about a year thereafter, executed another contract to the plaintiffs Herrick and Stevens. That prior to the execution and in connection therewith of the contract from Watson and wife hereinbefore set out to Herrick and Stevens¹ Sargeant & Lahr had failed and refused to perform the conditions of their contract and had informed said Watson and said Herrick that they made no claim under the contract from Watson and wife to them, that they fully surrendered and agreed to abandon said contract, and so informed the plaintiffs Herrick and Stevens.

That relying upon said statements, and on their failure and refusal and neglect to pay anything on their said contract with Watson, Herrick and Stevens entered into the contract with Watson and paid their money as a part of the purchase price of the original contract from Watson and wife to them. And said Sargent and Lahr agreed to deliver a quit claim deed to said Watson for each and all interest, right and title that they had under and by virtue of their contract aforesaid, and to surrender the same, and that said Herrick and Stevens, relying on the statements of said Watson and said Sargent and Lahr, and led thereby to pay said money to said Watson for their contract were thus induced to part with said money and to enter into the contract sued on in this case.

These plaintiffs further aver that thereafter they leased said land to said Watson, and otherwise treated it and used it as their own, entered into contract of lease with others for parts of said
34 land, all of which matters were personally well known to the defendants Sargeant and Lahr.

And these plaintiffs further state that afterwards, conspiring together, about March, 1903, and with full knowledge and notice that these plaintiffs held an executed contract for the purchase of said land from Watson and wife, had paid part of the purchase price thereon, and claimed title to the same, and notwithstanding the acts and statements hereinbefore referred to, which said Sargent and Lahr themselves had made to said Watson, authorizing him to sell the land to Herrick and Stevens and abandoning the contract which they had from Watson themselves, with intent to defraud and with knowledge of the plaintiffs' rights, procured a deed from John Watson and wife to said land and placed the same of record on or about March, 1903, and still further conspiring with said Watson, agreed with said Watson to protect him and keep him harmless from cost or expense and to protect him from all loss and from all question of damages against any claims of these plaintiffs, and with the knowledge aforesaid, fraudulently and falsely in writing made false and fraudulent representations to the Land Department at Washington, to the Department of the Interior, making affidavit and representations to the Commissioner of the General Land Office at Des Moines, Iowa, that they had acquired all of the interest of the said Hartzell J. Schaffer, and of all other persons who had or claimed any interest in and to the above described premises, when they knew said statements to be false and untrue, and thereby perpetrated, by misrepresentation and false statements, upon the Commissioner of the General Land Office at Des Moines, a fraud, and by such statements were able to procure a patent on said property to be issued to one Amos Stanley, who claimed to be an assignee of Hartzell J. Schaffer, about the year 1860. And the plaintiffs claim

35 that the procurement of said patent was by a fraud and false representations, and that the same was a nullity and void.

They further claim that because of the statements and acts of the defendants and their knowledge of the plaintiffs' rights they are estopped from obtaining title as against said plaintiffs to said land, and that their acts, procurement, and claim of title is and has

been a mere attempt on their part to fraudulently dispossess the plaintiffs of said land and their title. And the plaintiffs aver that if said patent is held to avail, that the same is a procurance of said title in said Amos Stanley, one of the grantors of these plaintiffs, that the same redounds to and relates back to the time of the taxation of said land, and effects the complete and absolute fee title of said land in the plaintiffs.

Wherefore, the plaintiffs claim as originally in their cross petition and for general equitable relief.

And upon the issues thus joined by the above and foregoing pleadings, the parties hereto proceeded with the trial of said cause, offered and introduced testimony which was taken down in shorthand by M. C. Grier, the official shorthand reporter of the District Court of Clay County, Iowa, during the trial of said cause before W. B. Quarton, who at that time was a judge of the District Court of Clay County, Iowa, and the said Quarton having refused and declined to decide said cause, notwithstanding that all of said testimony was so offered and introduced during the trial of said cause before him, the parties hereto entered into and signed the following

Stipulation.

In the District Court of the State of Iowa in and for Clay County.

HERRICK and STEPHENS, Plaintiffs,

vs.

SARGENT and LAHR et al., Defendants.

Stipulation.

It is hereby stipulated and agreed by the parties hereto
36 that, whereas, at the August 1905 Term of the District Court of Clay County, Iowa, evidence and testimony in the above entitled cause was taken and the trial of said cause was begun; and,

Whereas, no judgment or decree has ever been rendered by the trial court in said cause, the Honorable W. B. Quarton being the trial judge; and,

Whereas, the Honorable W. B. Quarton is about to retire as one of the judges of the District Court of the State of Iowa, and has failed to render any judgment or decree in said cause or to decide the controversy involved in this suit,

It is hereby Stipulated and Agreed by the respective parties hereto that in so far as said cause has, up to this time, been submitted to the Honorable W. B. Quarton, Judge, said submission is, by the respective parties hereto and by the consent of the Honorable W. B. Quarton and upon the suggestion and solicitation of the said Honorable W. B. Quarton, Judge, withdrawn from the Honorable W. B. Quarton, Judge.

And it is agreed by the respective parties hereto that the official shorthand reporter of said court shall, with all due dispatch, forth-

with transcribe and extend into longhand the official shorthand notes of said reporter taken in said cause.

And it is further agreed by the parties hereto that this cause shall be submitted and tried upon said transcript of said notes, or upon such further and additional testimony as the respective parties hereto may elect to offer during the trial of said cause.

And it is further agreed that the said cause shall be tried and submitted to the District Court of Clay County, Iowa, and the trial of said cause shall commence on the 1st day of the next regular term of the District Court of Clay County, Iowa, and shall proceed to a full and orderly termination without delay, continuance
37 or postponement asked or had upon the application of either party hereto, or the first time the court can hear same.

And it is further agreed and stipulated by the parties hereto that the costs incurred in procuring and obtaining the translation of the shorthand notes in this cause and the extending hereof into longhand shall be taxed as a part of the costs in this case.

(Signed)

F. H. ELSELL,

Attorneys for Plaintiffs.

(Signed)

HEADY & HEALY,

Attorneys for Defendants, Sargent and Lahr,

F. A. Lahr and Wife, and Charles Sargent.

Which stipulation was on the 15th day of December, A. D. 1906, filed in the office of the Clerk of the District Court of Clay County, Iowa. And under and pursuant to said stipulation and in the due and regular course of business of the District Court of Clay County, Iowa, at the January 1907 Term of Court, said cause of action was called for trial and the same proceeded to trial, and pursuant to said stipulation and by the agreement of the respective parties, this cause came on for hearing on the 6th day of February, A. D. 1907, in open court before the Honorable A. D. Bailie, Judge, presiding. Opening statements of counsel were made and as per stipulation the evidence which was taken down in shorthand by the said M. C. Grier, official reporter for said court, duly filed in the office of the Clerk of the District Court of Clay County, Iowa, on January 23, 1907, was read in open court to the court, and the transcript Marked Exhibit 1 was agreed to be and was introduced in evidence by both parties, and the same was introduced severally, subject to all the objections that the transcript contains and the exhibits referred to therein were each and all produced and offered and read in evidence, and thereupon the plaintiffs introduced the following

Testimony.

It is stipulated and agreed between all the parties to the action that Herrick and Stevens and neither of the members of that firm have in their possession or under their control a certain tax deed from the Treasurer of Clay County, Iowa, to W. L. Simmons, and it was conceded that Book K., of Deeds now produced is the genuine and original record of Deeds of Clay County, Iowa, and that the certain deed appearing on page 41 of said record, said deed was a

tax deed from the Treasurer of Clay County, Iowa bearing date September 26, 1878, and appeared to be filed for record on September 26, 1878, and recorded in Book K of Deeds, page 41 for the East one-half of the Southeast Quarter (S. E. 1-4) of Section Eleven (11), Township Ninety-four (94), N. Range Thirty-five (35) West, sold on January 5, 1875 for taxes of 1873.

It was also agreed that none of the plaintiffs had in their possession or under their control the original deed from W. L. Simmons and wife to O. C. Ainsworth and the record of said deed found in Deed Record No. 3 page 438 was introduced in evidence by the plaintiff, said deed was a quit claim deed, dated February 11, 1889, filed for record February 25, 1889, and recorded in Book V. of Deeds, page 24, from W. L. Simmons and wife to O. C. Ainsworth for the east one-half of the Southeast Quarter of Section Eleven (11), Township Ninety-four (94), North, Range Thirty-five (35).

It was also agreed that the original deed which was recorded in Book 3, page 436, was not in the possession or under the control of the plaintiffs and the record of the same was introduced in evidence, said deed being a warranty deed from Oramel C. Ainsworth and wife to D. Hartley Richardson, bearing date September 22, 1894, filed for record February 29, 1896, and recorded in Record Book

3 of Deeds, page 436 for the above described land.

39 It was also agreed that the plaintiffs had not in their possession or under their control a certain warranty deed from D. Hartley Richardson to Mary A. Ainsworth, and the plaintiffs introduced in evidence the record of said deed, the same being a warranty deed dated October 28, 1896, filed for record February 7, 1900, recorded in Book 7 of Deeds page 436, for the above described real estate, from D. Hartley Richardson to Mrs. Mary E. Ainsworth.

There was also introduced in evidence by the plaintiffs the record of the warranty deed from Mary E. Ainsworth and husband to John F. Watson dated January 3, 1900, filed for record February 7, 1900, and recorded in Deed Record No. 9, page 128.

Plaintiffs also offered in evidence a certain land contract marked plaintiffs Exhibit "A," a copy of which contract is set forth as a part of the amended and substituted petition of the plaintiffs marked Exhibit No. "A."

Testimony of C. E. Herrick.

MR. HERRICK, one of the plaintiffs testified as follows:

My name is C. E. Herrick, am 53 years old, reside at Storm Lake and am one of the plaintiffs in this case. The other plaintiff is D. B. Stevens of Marathon, Iowa; I first saw Exhibit "A" on the 13th of June, 1900; I am acquainted with John F. Watson and his wife, Eva Watson, and I saw them both sign Exhibit "A" at that time; I then paid Mr. Watson \$100.00. The signature C. E. Herrick and D. B. Stevens appearing on Exhibit A were also put there the same day, and the contract was delivered to me the day I paid the money.

Q. Now, what, if anything, at that time, when you made this contract for the purchase of the land described therein did Watson say to you in regard to any contract that had theretofore been made between him and Sargeant & Lahr?

40 The defendants objected to the question as incompetent, immaterial and irrelevant, and as incompetent as against them.

Q. What talk did you have with John Watson about any contract that been theretofore existing between him and the defendants Sargeant and Lahr?

Same objection was made to this question as made to the preceding question.

A. He said he had a contract the year before, I think, a contract made in 1901, with Sargeant and Lahr for the sale of the land to them, and they had thrown up the contract; had forfeited on the contract, and had so notified him; he said when he went to close up the deal with them they had told him they would not fulfill the contract.

Q. Did Mr. Watson tell you that Sargeant and Lahr had so told him?

Same objection.

A. Yes sir; when we got the contract we found out after we had made the contract that Sargeant and Lahr's old contract was a matter of record; we went to Sargeant and Lahr to have them quit claim and clear the title to us; the first time I ever spoke to either of them about it was to Sargeant at Marathon; I met him in the postoffice one day and told him we had contracted with Mr. Watson for the land and we had since found out that the contract they had had the year before was a matter of record and asked Mr. Sargeant if they would quit claim and let us clear up the title so we could settle with Mr. Watson, and he said he would; he said they had refused to go further with the contract and thrown it up; he said on the day when this contract matured on the first day of March, prior that they had refused to go any further with the contract and had throwed it up, they had refused to Watson to go on.

Q. Now, did you do anything under your contract after
41 that in regard to fixing your title?

Ans. Only to see Mr. Sargeant and Lahr at different times and talk with them about quit claiming; I employed an attorney, F. C. Gilchrist of Laurens; I know he, Gilchrist went to Des Moines, spent a day or two or more in Des Moines in the matter looking up the records there and did some further correspondence; just all that he did I could not tell you. Gilchrist went up to see Sargeant and Lahr to get them to quit claim, so we could close up. Gilchrist was in the employ of Herrick and Stevens. Gilchrist and I at Webb saw Watson and Lahr on the 26th of February; I have seen Exhibit "B" before; I saw it on the 26th of February, 1903; that was the date Gilchrist and I went to Webb; John Watson and his wife

Eva and I signed it myself; on that day I had a talk with Mr. Lahr.

The plaintiffs offer in evidence Exhibit "B" consisting of two sheets and read the same and Exhibit "B" in the same as the copy attached to the petition.

To which the defendants object as incompetent, immaterial and irrelevant, and not properly identified.

I heard a talk between Watson and Lahr on that day in the street in Webb; I heard Watson ask Lahr; he says, Mr. Lahr, that you and Mr. Sargeant agreed with me again and again to quit claim on this land so that I could make my settlement with Herrick and Stevens; Lahr says, Yes sir, we have; and Mr. Watson said, Why don't you do it then, and Mr. Lahr says, because there is more money in it for us not to. I believe I had a little talk at that time with Mr. Lahr, but it was just a short talk; I asked him if he was not going to quit claim and he said, no, that they considered there was the most money in it for them to fight it out the other way, and they had made up their minds not to quit claim; that was mostly after he had had his talk with Mr. Watson. The matter of a contract between Herrick and Stevens and Watson, I do not think

42 was mentioned at that time; the contract was mentioned in that way; we wanted a quit claim deed so we could settle with Watson or Watson could settle with us on our contract March 1st; it was mentioned in that way. Gilchrist was present.

Q. Now, apart from the statements that Watson made to you in regard to Sargeant and Lahr fulfilling their contract, agreeing to abandon it, as you have said, and the talk with Sargeant and Lahr, apart from your understanding with them that the other contract was abandoned, would you have made this purchase of this land?

Objected to as calling for a conclusion and opinion of the witness, incompetent, immaterial and irrelevant, leading and suggestive.

A. We would not have gone any further with it or spent any more money in the deal if we had not taken it for granted that they would do as they agreed and quit claim.

Q. Well, would you have spent the original one hundred dollars that you paid for the land if Watson had not informed you as you say he did?

Same objection.

A. No sir, we would not.

Q. Did you rely on the statements making this deal that Watson had made to you, and also that Sargeant and Lahr had made to you?

Same objection.

A. We did, fully.

Q. Have you been ready, able and willing to complete that contract at all times, and are you now able, ready and willing to complete this contract with Watson, on his performance of the same?

Same objection.

A. Yes, sir.

Cross-examination:

Before I had my talk with Watson in reference to the buying of the land, and before Exhibit "A" was signed, Watson
43 told me that he had made a contract to sell the property to Sargeant and Lahr; at that time I did not know that the contract between Sargeant and Lahr was on record; June 13, 1902, was the first time that I knew of the existence of the contract for the sale of the property by Watson to Sargeant and Lahr; no, I knew it before that a day or two, two or three days, a few days before that; Speer came down; was sent down by Watson to sell us the land, and Speer told us about Watson having sold the land the year — to Sargeant and Lahr, and that they had thrown up the contract; I knew it then, just a few days prior to June 13th, two or three days prior, possibly a week; at the time I signed Exhibit "A" I paid Watson \$100.00 and since that time I have paid no more money upon the contract or upon any contract for the purchase of this land.

Q. You relied wholly upon what Watson told you at that time on June 13, 1902, in entering into and signing Exhibit No. "A?"

A. Yes, sir; prior to that time June 13, 1902, I had no talk or conversation of any kind with Sargeant and Lahr respecting their rights in this land; the reason I had Watson and wife sign Exhibit "B" was because Sargeant and Lahr had refused to quit claim and we entered that contract to go on and quit claim against them against Sargeant and Lahr for an extension of time on the contract; the truth is that prior to February 26, 1903, I did ascertain that Sargeant and Lahr still asserted some title and interest in this land in dispute; I did not know prior to February 26, 1903 that Sargeant and Lahr claimed to be the owners of the land under their contract from Watson but I did simply know that they claimed some interest in title in the land.

Q. And you knew that they refused to part with that title because you have requested them to do so, did you not?

A. Just to quit claim to us to get out of the other contract they
44 had with Mr. Watson, that was the only question of title that ever arose between us; and I knew some three or four days before February 23, 1903, that Sargeant and Lahr refused to part with their interest or convey it to me to the land in dispute; the object and purpose I had in procuring the execution by Watson and wife of Exhibit "B" was to give us time to quiet title against Sargeant and Lahr; give us time to quiet title against Sargeant and Lahr and Watson and wife; it was in the last days of February, three or four days before February 26, 1903, that I discovered that Sargeant and Lahr still asserted interest in the title of this property; in June, 1902 I met Sargeant in Marathon.

Q. Now, what was said at that conversation?

A. Why I had just found out that their contract with Mr. Watson was placed of record, and I asked Mr. Sargeant to quit claim so that we could straighten out our title with Watson and we would be ready for settlement with him when the day of settlement came and he said they would do so.

Q. Now, Sargeant said we have a contract for that land, did he?

A. He said they had a contract with Mr. Watson for that same land.

Q. And you said to Sargeant, will you quit claim to us?

A. Yes sir, and Sargeant said that they had thrown up the contract, yes, sir, and they would quit claim if it would be of any benefit to us; there was nothing said as to any pay for quit claiming, he said he would quit claim.

Redirect examination:

At the time that the contract was drawn up, I knew that Sargeant and Lahr then made some claim for the land, that was after the talk I heard between Watson and Lahr; it was the same day; earlier in the day; at the time that I sent Gilchrist down to Des Moines as attorney for me to look at the record, I had no idea that Sargeant and Lahr made any claim to that land.

45 Re-cross examination:

Mr. Herrick, just tell the court against whom you were going to quiet the title?

A. We were going to quiet title that I understood that — from any claim outside of this contract, claim we had; I knew they had this contract and I employed Gilchrist for the purpose of quieting title against Sargeant and Lahr.

Q. And that was the only purpose of your employment of Mr. Gilchrist, it was for the purpose of getting rid of Sargeant and Lahr from the record.

A. No, we employed him to go to Des Moines; he had been in the case for sometime; I don't know how long it was from that time up until a short time after we made the original contract.

Q. And the purpose of employing Gilchrist and of entering into Exhibit "B" by you and Watson was for the purpose of quieting title against Sargeant and Lahr; that is true?

A. Yes, sir, to get that contract out of the way.

Testimony of F. C. Gilchrist.

Mr. F. C. GILCHRIST testified for the plaintiffs as follows:

I am 36 years old and a lawyer and reside at Laurens; I was employed by Herrick and Stevens in June, 1902; I went to Des Moines in reference to the business on June, 9th, and I spent sometime in their employ there looking up the question of title, and afterwards as their attorney I visited Sargeant and Lahr at Webb and saw Sargeant on the 25th of February, 1903, and also Lahr in the winter of 1903, possibly in the month of February I had a conversation with Lahr; I told Sargeant that I was representing Herrick and Stevens and that Herrick claimed that he had agreed to quit claim his right in the land and that we understood that he had not, nor either claimed any rights in the land; he said that he had said he would

46 quit claim at one time; he also said that he had since that time acquired further rights in the land; he said that he was advised that Watson had no title and that so far as Watson's claims were concerned that they did not amount to anything; he said he did not claim under Watson's title; the only talk that I had with Mr. Lahr about it was that we was out in the street there at Webb on the 26th of February; Watson said that you have agreed that you would quit claim this back to me several times and Mr. Lahr said that that would not make any difference now that there was money in it for him not to do it; Exhibit B, 10-30-05 is in my handwriting; I wrote it on the 26th of February all but this signature; John F. Watson signed it in my presence and Eva Watson signed it in my presence; C. E. Herrick signed it in my presence; Herrick also signed the words D. B. Stevens by C. E. Herrick" in my presence; it was delivered to me at that time; I took it home with me; I commenced no action until the time this action was commenced, about, as I remember it, it was commenced along in the neighborhood of March 4th or 5th; I received from Mr. Watson no direction or information prior to the beginning of this action that he desired anything else done than what the contract provided.

Q. Did you from Mr. Watson at any time thereafter receive any notice whatever that you were discharged from the trial of the case?

A. Not until Mr. Healy filed the affidavit and statement in court here at the time the motion was made in the previous term of this court; Mr. Watson did not hold any communication with me whatever in regard to the abandonment of that case; there was never any profane language used by Herrick or myself in the presence of Watson and his wife; there was nothing said in the nature of a threat or of any vulgar character whatever; there was no loud talking or boisterous talk or any threats made in the presence of Watson and his wife by Herrick.

47 Cross-examination:

Pursuant to the terms of Exhibit "B" the present suit was begun; it was originally instituted solely against Sargeant and Lahr and Mrs. F. A. Lahr.

The defendant CHARLES SARGEANT, testified for the plaintiff- as follows:

C. E. Sargeant and F. A. Lahr composed the co-partnership of Sargeant and Lahr since 1901.

End of Plaintiffs' Testimony.

Defendants' Testimony.

The defendants offered in evidence Exhibit No. 1, the same being a patent signed by T. Roosevelt, President of the United States and by C. H. Bush, Recorder of the General Land Office; patent bearing

date the 23rd of August in the Year of our Lord 1904, for the premises described in plaintiffs' petition.

To which the plaintiffs objected as incompetent, immaterial and irrelevant because the same runs to one Amos Stanley and not to the defendants and because by the date thereof it is evident this cause was begun and pending and because no issue, tendering the issue presented under the patent was tendered by the defendants in this case.

(4-406.)

DEFENDANTS' EXHIBIT "ONE"

is as follows:

The United States of America to all to whom these presents shall come, Greeting:

Certificate No. 22029.

48 *Whereas* Amos Stanley has deposited in the General Land Office of the United States a Certificate of the Register of the Office at Des Moines, Iowa, whereby it appears that full payment has been made by the said Amos Stanley according to the provision of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provision for the sale of the Public Lands," and the acts supplemental thereto, for the East half of the South East quarter of Section eleven, in Township ninety four North, of Range thirty five West of the Fifth Principal Meridian in Iowa, containing eighty acres according to the official plat of the Survey of the said lands, returned to the General Land Office by the Surveyor General, which said Tract has been purchased by the said Amos Stanley in lieu of Sioux City, Iowa, Warrant Location, R. & R. No. 4732, Act of 1855.

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, Have given and granted, and by these presents, do give and grant, unto the said Amos Stanley and to his heirs, the said Tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Amos Stanley and to his heirs and assigns forever.

In testimony whereof I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty third day of August, in the year of our Lord one thousand nine
49 hundred and four, and of the Independence of the United States the one hundred and twenty ninth.

By the President:

T. ROOSEVELT,

By F. M. McKEAN, *Secretary*.

[SEAL.] C. H. BUSH,

Recorder of the General Land Office.

Recorded Iowa, Vol. 96, page 245.

(Endorsements on back:) 155 Amos Stanley. State of Iowa, Clay County, ss: Entered for Taxation, Oct. 31, 1905. E. F. Marker, County Auditor. State of Iowa, Clay County, ss. Filed for Record Oct. 31, 1905, at 2:45 o'clock P. M. and Recorded in Book 14 of Deeds, page 46. W. L. McCown, Recorder, By Anna McCown, Deputy. Charles Sargeant, Gilmore City, Ia. Notice sent to Charles Sargeant, Cherokee, Iowa, Sept. 16, 1904.

The defendants offered in evidence Exhibit No. Two, the same being a true and literal exemplification of the original papers now on file in the office of the Department of the Interior in the General Land Office of the United States Government, the same being under the signature and seal of J. H. Fimple, Acting Commissioner
50 of the General Land Office, and the defendants offered in evidence and read into the record Exhibit No. Two, to which the plaintiffs objected as incompetent, immaterial, irrelevant, and not part of the identification as by statute required and the foundation is not laid for the production thereof because it assumes to certify as to transactions and records made since the rights of these parties matured and accrued. Said

EXHIBIT No. Two

is as follows:

(4-207.)

R.
M. M. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 6, 1905.

I hereby certify that the annexed copy of the application and certificate of location under Military Bounty Land Warrant No. 27622, 80 acres, Act 1855, issued to Jacob Hutson is a true and literal exemplification of the original papers now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

J. H. FIMPLE,

Acting Commissioner of the General Land Office.

1177b3ml-04

[SEAL.]

E. 1/2 of S. E. 11-94-35-80. Military Bounty Land Act of March 3, 1855.

51 Land Warrant No. 27622.

Register and Receiver's No. 4732.

LAND OFFICE, SIOUX CITY, June 15, 1857.

We hereby certify, that the attached Military Bounty Land Warrant, No. 27622 was on this day received at this office, from Hartzell I. Shaffer of Stark County, State of Ohio.

S. P. YEOMANS, *Register.*A. LEECH, *Receiver.*

I, Hartzell I. Schaffer of Stark county, State of Ohio hereby apply to locate and do locate the East half of South East quarter of Section No. 11 in Township No. 94 of Range No. 35 in the District of Lands subject to sale at the Land Office at Sioux City containing 80 acres, in satisfaction of the attached Warrant numbered 27,622 issued under the act of March 3, 1855.

Witness my hand this 15th day of June A. D. 1857.

HARTZELL I. SHAFFER.

Attest:

S. P. YEOMANS, *Register*.

A. LEECH, *Receiver*.

I request the Patent to be sent to Des Moines Cash No. 22029 substituted Febr'y 15, 1904.

LAND OFFICE, SIOUX CITY, IOWA, *June 15th, 1857.*

We hereby certify, That the above location is correct, being in accordance with law and instructions.

A. LEECH, *Receiver*.

S. P. YEOMANS, *Register*.

Mar. 24-04.

Military Bounty Land Act of March 3, 1855.

REGISTER'S OFFICE,
SIOUX CITY, *June 15, 1857.*

52 Military Land Warrant No. 27,622 in the name of Jacob Hutson had this day been located by Hartzell I. Schaffer upon the East $\frac{1}{2}$ of Southeast Quarter of Section 11 in Township 94 N., of Range 35 W. subject to any pre-emption claim which may be filed for said land within forty days from this date.

Contents of tract located, 80 acres.

S. P. YEOMANS, *Register*.

Insp'd. See Dock. A. 2, p. 198.

For value received, I, H. I. Schaeffer to whom the within certificate of location was issued, do hereby sell and assign unto Amos Stanley and to his heirs and assigns forever, the said certificate of location, and the warrant and land therein described, and authorize him to receive the patent therefor.

Witness my hand and seal this 24 day of February 1858.

H. I. SCHAEFFER. [SEAL.]

Attest:

E. N. SLENTZ.

J. L. HANNA.

STATE OF OHIO, *County of Mahoning:*

On this 24 day of February, 1858, before me, personally came Hartzell I. Schaeffer to me well known, and acknowledged the foregoing assignment to be his act and deed, and I certify that the said

Hartzell I Schaeffer is the identical person to whom the within named warrant was issued.

JOSEPH L. HANNA,
Notary Public.

[NOTARIAL SEAL.]

I 37,631. M'ch 7, 1871, filed by R. W. Walker, Washington D. C.

53 Endorsements on Back: 27,622-80. Act 1855. June 1857.
4732. 27622. Sioux City. Des Moines, Cash 22029 subst.
Duplicate filed by R. W. Walker, Washington D. C. I 37,631.
March 7, 1871. No conflict of record. Location approved May 16.
1885, J. L. W. A-2. P 198. 4732. W. G. W. A-2 P. 198.

The defendants offered in evidence and read into the record Exhibit No. Three, the same being a true and literal exemplification of the originals of papers in the Des Moines, Iowa, Cash Entry No. 22029, the same appearing under the signature of C. H. Bush, Recorder of the General Land office and the exhibits and papers thereto attached.

To which the plaintiffs made the same objection as last above made. Said

EXHIBIT NO. THREE

is as follows:

4-207.

B.

M. F. H.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C. Jan. 3, 1905.

I hereby certify that the annexed copy of papers filed with Des Moines, Iowa, Cash Entry No. 22029 are true and literal exemplifications of the originals in this office.

54 In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

C. H. BUSH,

[SEAL.]

Recorder of the General Land Office.

Mar. 23-04.

Military Bounty Land Act of March 3, 1855.

REGISTER'S OFFICE

SIoux CITY, June 15, 1857.

Suspd. see Dock. A-2 p. 198.

Military Land Warrant No. 27622, in the name of Jacob Hutson has this day been located by Hartzell I. Schaffer upon the East ½ of South East quarter of Section 11, in Township 94 N. of Range 35 W., subject to any pre-emption claim which may be filed for said land within forty days from this date.

Contents of tract located, 80 acres.

S. P. YEOMANS, *Register.*

M. L.

I 37,631. M'ch. 7, 1871, filed by R. W. Walker, Washington, D.C.

For value received, I, H. I. Schaffer, to whom the within certificate of location was issued, do hereby sell and assign unto Amos Stanley, and to his heirs and assigns forever, the said certificate of location and the warrant and land therein described, and authorize him to receive the patent therefor.

Witness my hand and seal this 24 day of February 1858.

H. I. SCHAFFER. [SEAL.]

Attest:

E. N. STENT.

J. L. HANNA.

55 STATE OF OHIO,
County of Mahoning:

On this 24 day of February, 1858, before me, personally came Hartzell I. Schaffer, to me well known, and acknowledged the foregoing assignment to be his act and deed; and I certify that the said Hartzell I. Schaffer is the identical person to whom the within-named warrant was issued.

JOSEPH L. HANNA,

[L. s.]

Notary Public.

Des Moines Cash No. 22029. Substituted Feb'y 15, 1904.
Land Warrant No. 27,662 Register and Receiver's No. 4732.

Military Bounty Land Act of March 3, 1855.

U. S. LAND OFFICE, SIOUX CITY, June 15, 1857.

We hereby certify that the attached Military Bounty Land Warrant No. 27622 was on this day received at this office, from Hartzell I. Schaffer, of Stark County, State of Ohio.

S. P. YEOMANS, *Register.*

A. LEECH, *Receiver.*

I, Hartzell I. Schaffer of Stark County, State of Ohio, hereby apply to locate and do locate the East half of South East quarter of section No. 11, in Township No. 94 of range No. 35, in the district of lands subject to sale at the Land Office at Sioux City, containing 80 acres in satisfaction of the attached Warrant numbered 27622, issued under the Act of March 3, 1855.

Witness my hand this 15 day of June A. D., 1857.

HARTZELL I. SCHAFFER.

Attest:

S. P. YEOMANS, *Register.*

A. LEECH, *Receiver.*

I request the patent to be sent to ———.

TOWNSHIP No. 94 N.

DESCRIPTION OF TRACT.					CONTENTS.
Part of section.	Section.	Township.	Range.	Aeres.	100ths.
E. $\frac{1}{2}$ S. E. $\frac{1}{4}$	11	94	35	80	Sub in lieu of warrant
E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$...	11	94	35	80	Located June 15, 1857
See Com's letter Nobb 14 and Dec. 2, 1879.					
See Com. letter as " B " Nov. 18, 1884 See Com. letter March 23rd, 1864					
See Com. letter as " B " April 30, 1891, Copy of March 23rd, 1863, encl					

NGE No. 35 W.

DISTRICT OF

the purchaser.

Stanley.

L. W. No. 27622 Act 1855.

as "B" May 16, 1865, and "B" July 16, 1885.

DATE OF SALE.

Com. B, Jan. 23, 1904.
Feb. 15, 1904.

Num
rece
cer
of p

2

HOUX RIVER.

Number of tract and locate purchase.	TO WHOM PATENTED.	DATE OF PATENT.	WHERE.	RECORDER.
			Volume.	Page.
029	Amos Stanley.	Com. "B" Jan. 23, 1904.		

U. S. LAND OFFICE,
DES MOINES, IOWA, *April 5, 1905.*

I hereby certify that the foregoing is a true and literal copy of the tract book in this office in so far as the tract described is concerned.

I further certify that the notations made hereon as "Com. B" has reference to letters from the Commissioner of the General Land Office, said letters are now on file as a part of the records of this office.

THORNTON S. HOWARD,
Register.

Endorsements on back :

160 5 State of Iowa, County of Clay, ss: Filed for Record Oct. 31, 1905, at 2.45 o'clock P. M. and Recorded in Book 14 of Deeds, page 49. W. L. McCown, Recorder. (Signed) By Anna McCown, Deputy. Chas. Sargeant. 50 cts. Gilmore City, Ia.



56

U. S. LAND OFFICE,
SIOUX CITY, June 15, 1857.

We hereby certify that the above location is correct, being in accordance with law and instructions.

A. LEECH, *Receiver*.
S. P. YEOMANS, *Register*.

4660 b1m 10-97.

M. L.

Endorsements on back: No. 27622. 80 acres. Act of March 3, 1855. June 1857. Located at Sioux City, Des Moines, Cash 22029 subst. Suspended. Duplicate filed by R. W. Walker, Washington, D. C. I 37,631. March 7, 1871. No conflict of record. Location approved. May 16, 1885. J. L. W. Patented — 189—. Recorded Vol. —, P. —. Transmitted to ———. R. & R. No. —. 466-Oblm 10-97. A. 2. p. 198. 4732 W. G. W. A 2 p. 198. Land Warrant 158.

57

STATE OF IOWA,
Clay County, ss:

Filed for Record Oct. 31, 1905, at 2:45 o'clock P. M., and Recorded in Book 14 of Deeds Page 48.

W. L. McCOWN, *Recorder*.
By ANNA McCOWN, *Deputy*.

Charles Sargeant, Gilmore City, Iowa. 80 cts.

The defendants offered in evidence and read into the record Exhibit No. Four the same being a true and literal copy of the tract book in Des Moines United States Land Office in so far as the tract described, the same being the East one-half (E. $\frac{1}{2}$) of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Eleven (11), Township Ninety-four (94,) Range Thirty-five (35), as the same is identified and authenticated under the signature of Thornton S. Howard, Register of the United States Land Office at Des Moines, Iowa, to which the plaintiffs object, because the same is a mere skeleton and not a statement of the contents and is not an exemplification as it appears so on its face, it not being an exemplification of any statement which in any way under the law had or could affect the title thereto. It is not properly identified and is not such a book as is approved by law to be kept in an office and certified to as in this exhibit stated and the foundation has not been laid for its introduction and it is irrelevant and immaterial to the issues in this case.

EXHIBIT NO. FOUR

is as follows:

(Exhibit No. Four is found on the folded insert between pages 56 and 57.)

58 The defendants offered in evidence Exhibit No. Five, the same being a letter from J. H. Fimple, Assistant commissioner of the Department of the Interior of the General Land Office, directed to the Register and Receiver, Des Moines, Iowa said Exhibit No. Five being authenticated and identified and certified as a copy of a letter of Commissioner's Letter "B" of January 23, 1904, which is referred to in the Tract Book as Com. B. Jan. 23, 1904, said letter is now on file in and forms part of the record in this office and signed by Thornton S. Howard, Register, which the plaintiffs object as a mere ex-parte statement, and admittedly a copy thereof, and the same is not any record or instrument in writing authorized or in any way binding upon the plaintiffs in this case, nor has it been duly identified and the foundation laid, and not such an instrument as may or can effect the title to the land in question adversely to the plaintiff, because the same is not such a record as is admitted by statute to be introduced in the manner in which it is sought to be introduced, or kept or made a part of the record, because upon its face it purports to be merely an exparte statement of transactions which do not govern, and which are no part of the record title to this land.

The defendants offer in evidence and read into the record Exhibit No. Six, the same purporting to be a letter dated May 16, 1885, addressed to the Register and Receiver at Des Moines, Iowa, from L. Hazen, Assistant Commissioner of the General Land Office, and the same is identified and exemplified and certified over and above the signature Thornton S. Howard, Register, a literal copy of Commissioner's Letter "B," May 16th, 1885, which is referred to in the tract book as Coms. letter B May 16, 1885, and said letter is now on file in and forms a part of the records of this office.

To which the plaintiffs made each and all of the objections last above made and the further objection that it is admitted to
 59 be and is an exparte declaration, not authorized by law, and taking place since the rights of these parties matured.

EXHIBIT NO. 5

is as follows:

1903.

C. H. B.
 J. H. D.
 T. W. A.

DEPARTMENT OF THE INTERIOR,
 GENERAL LAND OFFICE,
 WASHINGTON, D. C., *January 23, 1904.*

J. C. H.

Register and Receiver, Des Moines, Iowa.

Sirs:—June 15, 1857, Hartzell S. Schaffer located at the Sioux City Land Office Warrant 27622 (80 acres Act of 1855) upon the E. ½ S. E. ¼ Sec. 11 T. 94 N., R. 25 W. 5 P. M., when the location was returned to this office it was suspended because the warrantee has assigned the warrant to different parties.

September 7, 1875, the warrant was delivered to R. W. Walker of this City who, as attorney for Amos Stanley assignee of Schaffer had previously filed the Register's duplicate certificate, duly assigned, for the purpose of having the warrantee's assignment perfected and it has never been returned.

Mr. F. A. Lahr of Webb, Iowa, on behalf of himself and Charles Sargent, owners have filed an application for the issuance of patent. By office letter "B" of this date they have been allowed to substitute \$100 in lieu of the warrant upon application to your office and payment of the money.

Should they apply therefor and pay the money for the land described you will issue the regular cash receipt and certificate in the name of Amos Stanley the said assignee, giving them the current cash number and date.

Across the face of the certificate note in red ink that substitution was made in lieu of Sioux City Register and Receiver's certificate 4732 founded upon warrant 27622 (80 acres act of 1855), referring to this letter as authority.

In the receipt give the name of the parties paying the money as owners, and forward the papers with your regular monthly returns. Having notified Mr. Lahr, notice by your office will be unnecessary.

Respectfully,

J. H. FIMPLE,
J. H. FIMPLE,
Assistant Commissioner.

U. S. LAND OFFICE,
DES MOINES, IOWA, April 5, 1905.

I hereby certify that the foregoing is a true and literal copy of Commissioner's letter "B" of January 23, 1904 which is referred to in the Tract Book as "Com. 'B' Jan. 23, 1904." Said letter is now on file in and forms a part of the records of this office.

THORNTON S. HOWARD, *Register.*

Endorsements on back: 28 Com. 'B' 157. Jan. 23-1904. Received Jan. 27, 1904. Advises this office to allow substitution for Sioux City L. O. Wt. 27622 on E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ -94, 35. Feb. 15, 1904 Substitution made. Copy of letter 2. State of Iowa, Clay County, ss: Filed for record, Oct. 31, 1905, at 2:45 o'clock, P. M. and recorded in Book 14 of Deeds, page 47. W. L. McCown, Recorder. (Signed) by Anna McCown, Deputy. Thos. Sargeant, Gilmour City, Iowa. Posted.

EXHIBIT No. SIX

is as follows:

85-48276

J. A. D. F. S.

Warrant.

"B."

DEPARTMENT OF THE INTERIOR, W. O. C.
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 16, 1885.

47137.

Register and Receiver, Des Moines, Iowa.

GENTLEMEN: Referring to your letter of 9th instant (the Register's) relative to making substitution for Warrant 27,622, 80 acres, Act 1855, located at Sioux City, June 15, 1857, by Hartzell K. Schaffer upon the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ Sec. 11 T. 94, R. 35, W. R. and R. 4732, you are advised that said location was suspended for the reason that there were two assignments of the Warrant from the warrantee and no relinquishment from the first assignee.

62 The warrant was delivered to R. W. Walker of this City Sept. 7, 1875, he having surrendered the duplicate certificate of location, which duplicate was properly assigned by the locator to Amos Stanley.

November 21, 1879, Mr. Walker advised this office that on the 9th, September 1875, he transmitted said warrant to Messrs. "Wold and Landt of Topton, Iowa, with instructions as to what was required, and it has not since been returned to me (Walker)".

The warrant has not yet been returned to this office.

Section 41, page 5, of our Circular, of July 20, 1875, "Respecting the location and assignment of B. L. Warrants" provides how substitution may be made in cases where a valid entry is withheld from patent on account of the objectionable character of the Warrant, etc.

The substitution must be made in the name of the original locator and the patent will issue in name of Amos Stanley assignee of H. I. Schaffer.

In case substitution is made in Cash, in all cases, you will issue a receipt only,—as in case of an excess payment,—showing the name of the party who makes the substitution. Endorse on the face of the receipt in red ink substitution for Warrant No. — for — acres, Act of —.

Very respectfully,

L. HARRISON,
Asst. Commissioner.

U. S. LAND OFFICE.
DES MOINES, IOWA, April 5, 1905.

I hereby certify that the foregoing is a true and literal copy of Commissioner's letter "B" of May 16, 1885, which is refer-ed to on

the Tract book as "Com.'s Letter as B May 16, 1885." Said letter is now on file in, and forms a part of the records of this office.

THORNTON S. HOWARD, *Register*.

63 Endorsements on back: Comm.s' Letter "B." May 16, 1885. E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ 11-94 N. 35 W. Hartzell J. Schaffer, Amos Stanley, and O. C. Ainsworth. See Com.'s letter as "B," November 18, 1884. Wrote Ainsworth May 26-1885. See Com.'s Letter "B" July 16, 1885. Copy of letter 1 156. State of Iowa, Clay County, ss: Filed for Record Oct. 31, 1905, at 2:45 o'clock P. M. and Recorded in Book 14 of Deeds, page 46. W. L. McCown, Recorder. (Signed) By Anna McCown, Deputy. Charles Sargent, 50, Gilmore City, Iowa. Posted.

And the plaintiff moves to exclude each and all of the exhibits offered separately and together for the further reason that at this stage of the record, the defendants are estopped to make claim thereunder by the transaction and under the record as it now stands.

It was agreed that the parties hereto that the Deed Record No. F is the Deed Record of Clay County, Iowa, and is and forms and constitutes a part of the records of the Recorder of Clay County, Iowa,

and it is agreed by the parties hereto that the warranty deed recorded on pages 486 and 487 of said Deed Record Number "F" is not now and never has been in the possession of the defendants Sargeant & Lahr, or Mrs. F. A. Lahr, or any of said defendants, and it is further agreed that said warranty deed referred to above in this offer and said exhibit is not now and never has been in the possession or under the control of any of the parties to this suit.

And it is further agreed that said deed described in Exhibit No. F, may be copied by the reporter into the record.

The plaintiffs objected to the introduction of deeds on pages 486 and 487 for the reason that the foundation has not been laid for the introduction of such evidence, and for the further reason that the same is not approved, acknowledged or identified as by law required so as to entitle the same of record and they object further because the deed does not assume to convey the property in controversy and is immaterial and is irrelevant.

It was further agreed by the parties hereto that said deed referred to in said Exhibit F may be copied into the record by the reporter, said deed being a warranty deed, dated August 11, 1870, filed for record August 22, 1870, in Book No. F, of Deeds, page 486, and is as follows:

Warranty Deed.

(Copy.)

This Deed of Bargain and Sale Made and executed this Eleventh day of August A. D. 1870 by and between Amos Stanley and Rachel A. Stanley his wife of the city of Cedar and State of Iowa parties

of the first part and S. V. Landt of the second part witnesseth: That the said parties of the first part for and in consideration of the sum of One Thousand Dollars to them paid by the said party of the second part and receipt of which is hereby acknowledged had
 65 Granted and Sold and by these presents Grant, Bargain, Sell
 Convey and Confirm unto the said party of the second part his heirs and assigns forever the Certain tract of parcel of Real Estate in the County of Clay, State of Iowa to-wit:

The South half of Section Eleven (11) in Township Ninety-four (94) North of Range Thirty-five (35) West of the 5th P. M.

To have and to Hold the premises above described with all appurtenances thereto belonging unto ——— in him the said second party and to his heirs and assigns forever. The said Amos Stanley hereby covenanting for his heirs executors and administrators that the above described premises are free from any incumbrance; that he has full right, power and authority to sell the same and he will warrant and Defend the title unto the said party of the second part his heirs and assigns against the claims of all persons whomsoever lawfully claiming the same. And the said Rachel A. Stanley wife of the said Amos Stanley hereby releases and relinquishes all her right of Dower in and to the foregoing described premises.

In witness whereof. The said parties of the first part have hereunto set their hands and seals the day and year first herein written.

AMOS STANLEY. [L. s.]

RACHEL A. STANLEY. [L. s.]

(Two U. S. Rev. Stamps 50 each, Aug. 11, 1870.)

STATE OF IOWA,

Cedar County, ss:

Be It Remembered That on this Eleventh day of August A. D. 1870 before the undersigned a Notary Public within and for said County personally appeared Amos Stanley & Rachel A. Stanley to me personally known to be the identical persons whose names are
 66 subscribed to the foregoing deed as grantors and acknowl-
 edged the instrument to be their voluntary act and deed and
 that they executed the same for the purposes therein men-
 tioned.

Witness my hand and Notarial seal the day and year last above written.

[L. s.]

J. G. McOLLOUGH,
Notary Public.

Filed for record August 22, 1870 at 2 P. M.

J. J. BICKNELL, *Recorder.*

It was agreed that the Deed Record No. "G," is a record in the office of the Recorder of Clay County, Iowa, and further identification of said Exhibit No. "G" was waived, and it was agreed and admitted by the parties hereto that the certain warranty deed which — recorded on page- 491 and 492 thereof, running from Sanford B.

Landt and Bertha Landt his wife to Hiram Balliett is not now and never has been in the possession and under the control of any of the parties to this suit, and the defendants offer and read in evidence from said Exhibit and page- No- 491 and 492 thereof, of said deed.

And it was further agreed by the parties hereto that the reporter may copy said deed into the record, as the same appears in said book.

Mr. F. H. HELSELL: Each and all of the above objections that are urged to the last exhibit are urged to this.

Said deed is as follows:

This deed of Bargain and Sale made and executed this 7th day of February A. D. 1872 by and between Sanford V. Landt and Bertha Landt his wife, of the County of Cedar and State of Iowa, parties of the first part, and Hiram Balliet of Lehigh County, Pa., of the second part, Witnesseth: That the said parties of the first part for and in consideration of the sum of Twelve hundred and eighty

67 Dollars to them paid by the said Party of the second part, the receipt whereof is hereby acknowledged have granted and sold and do by these presents, Grant Bargain, Sell, Convey and Confirm unto the said party of the second part his heirs and assigns forever, the certain tract or parcel of Real Estate, in the Clay County State of Iowa to-wit:

The South half of Section Number Eleven (11) in Township Ninety four (94) North of Range Thirty-five (35) West of the 5th P. M. containing Three hundred and twenty acres more or less, according to Government Survey.

To have and to hold the premises above Described with all the appurtenances thereto belonging, unto him the said second party and to his heirs and assigns forever. The said parties of the first part hereby covenanting for themselves and their heirs and assigns, against the claims of all persons whomsoever, lawfully claiming the same, and the said Bertha Landt wife of the said S. V. Landt hereby relinquishes all her right of Dower, in and to the foregoing described premises.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

S. V. LANDT. [SEAL.]
BERTHA LANDT. [SEAL.]

STATE OF IOWA,
Cedar County, ss:

Be it remembered that on this Seventh day of February A. D. 1872, before the undersigned a Notary Public in and for said County came S. V. Landt and Bertha Landt his wife to me personally — to be the identical persons whose names — subscribed to the foregoing Deed as grantors and acknowledged the instrument to be their voluntary act and deed and that they executed the same, for the purpose therein mentioned.

Witness my hand and Notarial Seal the day and year last above written.

[L. s.]

H. R. PORTER,
Notary Public.

68 (U. S. Rev. Stamp 50c.) (S. V. L. Feb. 7", '72)
(U. S. Rev. Stamp \$1.00) (S. V. L. Feb. 7" 1872.

Filed for Record the 16th day of May A. D. 1872 at 9 A. M.
J. G. Dodd, Recorder.

It is further agreed by the parties that the warranty deed referred to in said offer and said Exhibit is not now and never has been in the possession or under the control of any of the parties to this suit.

It was agreed by the parties hereto that the book called and named "Original Entry Book of Clay County, Iowa," is a record kept in the office of the Recorder of Clay County, Iowa, and further identification of said original entry book is waived.

It is further admitted by the parties hereto that a certain certificate of original entry for the East one-half (E. $\frac{1}{2}$) of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Eleven (11), Township Ninety-four (94), Range Thirty-five (35) is not and never has been in the possession or under the control of any of the parties hereto and said defendants at this time offer in evidence and read into the record from page 75 of said book as follows:

Under the heading description of tract, part of section, as follows:
The east half of the south east quarter.

Under the heading Section the figures 11.

Under the heading Town the figures 94.

Under the heading Range the figures 35.

Under the heading Contains acres, the figures 80.

Under the heading Name of Purchaser, Hartzell J. Schaeffer. See Com.'s letter B July 16, 1885.

Under the heading Date of Sale, June 15, 1857.

69 Under the heading of Number of Certificate the figures
27,622-55-100.

Under the heading To Whom Patented, the following, Issue of Patent suspended March 23 a line, figure 69.

Under the heading, Date of Patent, the following: See Com.'s letter November 14, and the addition marked December 2, and line, 79.

To which the plaintiffs make no objections, except to that part of it under the head of to whom patented, Issue or patent suspended March 23, 1869. See Com.'s letter November 4, and December 2nd, 1879, as it appears that the same is not in the same handwriting or is not a part of the original record, the same having been inserted therein in lead pencil by apparently and certainly a different party, and as a part of the same offer if any is entered under the same heading, volume and page the words in ink "Patent here."

The defendants except to the objection, because it is not in accord with the exhibit, which is produced and offered in court, and therefore move the court to strike from the record the said objection

for the reason urged in the objection, to-wit, that said objections are not in accord with the exhibit as offered and identified.

The defendants offer in evidence and read into the record the deposition of Oliver P. Balliett, which was taken in this case, pursuant to the notice and return and filed in the office of the Clerk of the District Court of Clay County, on December 7, 1904, the same is marked and identified by the recorder as Exhibit No. 7.

To which the plaintiffs object as not properly proved, identified or certified to as by law required and if admitted the plaintiff makes the objections to each question that the same is incompetent, irrelevant and immaterial, as not the best evidence and mere conclusions.

70 OLIVER P. BALLIETT, testified as follows:

My name is Oliver P. Balliett; I am 42 years old and reside in Allentown, Pennsylvania and I am an engineer; I have resided in Pennsylvania for 42 years and was acquainted with one Hiram Balliett in his life time; he was my father; Hiram Balliett died January 18, 1881 at Balliettsville, Pennsylvania.

Q. You may state whether the same Hiram Balliett was the same Hiram Balliett who was the grantor in a certain warranty deed, dated February 7, 1872, filed May 16, 1872, and recorded in Book G, page 491 in the Recorder's office of Clay county Iowa.

A. I know that he owned land in Clay County Iowa, and that he gave deeds, but to this particular deed, I cannot say, unless I could see his signature to it; I know that he made a deed to a man named Stanley, but cannot give date. He left no will; he was survived by his widow Caroline Balliett and the following children: Allen S. Balliett, now dead; Amanda C. Biery, Elmira Hoffman, Alice Schlauch, Susan Hottell, Oliver P. Balliett, Stephen H. Balliett; Allen S. Balliett left a widow, now married to George Schlauch; Amanda C. Balliett was married to Sylvanus Biery; Elmira Hoffman was married to Jefferson Hoffman; Alice Schlauch was married to Eugene Schlauch, Susan Hottell was Married to Milton Hottell; Olive P. Balliett was married to Laura J. Balliett; Stephen H. Balliett was married. Hiram Balliett left no other children than as above indicated. Caroline Balliett the widow of Hiram Balliett died March 21, 1894; Allen S. Balliett died November 24, 1884 and left surviving him a widow and one child; Ida V. Balliett, widow of Hiram J. Balliett; all of the above named daughters and sons and grand-children were the only heirs of the said Hiram Balliett, and they were all over the age of 21 years on March 21, 1903, and all of the sons and daughters of Hiram Balliett were married prior to March 21, 1903; the grand-son, Hiram J. Balliett was married to Ida Moser.

71

C. E. HERRICK, recalled for further examination in behalf of the plaintiff testified as follows:

Cross-examination:

This conversation that I say that took place in the postoffice at Marathon between Sargent or Lahr and myself took place in June sometime after we made the contract; I could not give the exact date; it was within a week or so or two weeks of June 13th; in the summer of 1902.

F. A. LAHR, testified in behalf of the defendant as follows:

My name is F. A. Lahr and am one of the defendants in this case; am 28 years old and at the present time reside at Conger, Minnesota; have lived there for about three months and am engaged in the banking business there. I formerly lived in Clay County, Iowa, in the town of Webb for about five years and was engaged in the banking business there. I know Watson and his wife and Herrick and Stevens; I have known Watson for about four years; Frank Post told me that the Watson land was for sale, sometime in 1900 or 1901; I did not have any conversation with Mr. Herrick on February 26, 1902, in the town of Webb; I did have a conversation at that time with Watson; Herrick did not on that day ask me if I would quit claim the property to him; either he or Stevens asked me if I would quit claim the property to him; I cannot say positively which it was, it was long before February 26, 1903; this conversation took place in the bank of Webb; one of them came in there and had a paper of some kind; he wanted me to sign and

72 he said he would like to get a quit claim of that Watson, or something to that effect anyway, and I told him that we would not quit claim it if we could get our other chain of title fixed up; at that time either Herrick or Stevens presented to me Exhibit No. Eight and either Herrick or Stevens at that time asked me to sign Exhibit No. Eight. I told them we would not release it if we could get our other chain of title fixed up; I do not remember of ever having any other conversation with Herrick or Stevens respecting the title to this land; I got Exhibit No. Nine in the envelope marked Exhibit No. 10 in April.

The defendants offer in evidence and read into the record Exhibit No. 10, and the registry mark thereon addressed to F. A. Lahr, Cashier of the Citizens Bank at Webb, Iowa.

To which the plaintiffs objected as incompetent, immaterial and irrelevant to any issue in the case.

Defendants offer in evidence and read into the record Exhibit No. 9 the same being a deed to the premises in dispute to the defendants Charles Sargent and F. A. Lahr, of the grantor named in said deed being Amanda C. Biery and others.

To which the plaintiffs made the same objection as last above.

EXHIBIT NO. NINE.

is as follows:

Know all men by these presents: That Amanda C. Biery, wife of Sylvanus Biery and the said Sylvanus Biery; Elmira S. Hoffman, wife of J. Jefferson Hoffman, and the said J. Jefferson Hoffman; Susan H. Huttell, wife of M. N. Huttell and the said M. N. Huttell; Alice S. Schlauch, wife of Eugene W. Schlauch, and the said Eugene W. Schlauch; Oliver P. Balliett and Laura J., his wife; Ida V. Balliett, widow; and Hiram J. Balliett and Ida M., his wife, the only child and heir of Allan S. Balliett, deceased, and Stephen H. Balliett and Florence M., his wife; the above named being all of the children and heirs (joined respectively by their husbands and wives) of Hiram Balliett, late of North Whitehall Township, Lehigh County, Pennsylvania, deceased, in consideration of Five Hundred and twenty-five Dollars, in hand paid by Chas. Sargeant of the County of Clay and State of Iowa do hereby remise, release and quit-claim unto the said Chas. Sargeant all their right, title and interest in and to the following described premises, with all appurtenances thereunto belonging, situated in the County of Clay and State of Iowa to wit: The East One-half ($E \frac{1}{2}$) of the Southeast one-fourth ($\frac{1}{4}$) of Section Eleven (11) Township Ninety-four (94) north, range thirty-five (35) West of the fifth (5th) Principal Meridian.

And the said Amanda C. Biery, Elmira S. Hoffman, Susan H. Huttell, Alice S. Schlauch, Laura J. Balliet, Ida V. Balliet, Ida M. Balliet and Florence M. Balliet hereby relinquish their right of dower in and to the foregoing described premises.

(Signed)

AMANDA C. BIERY.
SYLVANUS BIERY.
ELMIRA S. HOFFMAN.
J. JEFFERSON HOFFMAN.
SUSAN H. HUTTELL.
M. N. HUTTEL.
ALICE S. SCHLAUCH.
EUGENE W. SCHLAUCH.
OLIVER P. BALLIET.
LAURA J. BALLIET.
IDA C. BALLIET.
HIRAM J. BALLIET.
IDA M. BALLIET.
STEPHEN H. BALLIET.
FLORENCE M. BALLIET.

Signed this 21st day of March A. D., 1903, in the presence of

(Signed) EDWARD RUHE.
A. W. WILCOX.
JOHN S. SNOOK.

*Witnesses to Signatures of Stephen H. Balliett
and Florence M. Balliet.*

STATE OF PENNSYLVANIA,
County of Lehigh, ss:

On this twenty-first day of March, A. D., 1903, before me, Edward Ruhe, a Notary Public, in and for said Commonwealth residing at the City of Allentown in said County of Lehigh, personally came Amanda C. Biery, Sylvanus Biery, Elmhira S. Hoffman, J. Jefferson Hoffman, Susan H. Huttell, M. N. Huttel, Alice S. Schlauch, Eugene W. Schlauch, Oliver P. Balliett, Laura J. Balliet, Ida V. Balliet, Hiram J. Balliet and Ida M. Balliet personally to me known to be the identical persons whose names are affixed to the above instrument and severally acknowledged the execution of the same to be their and each of their voluntary act and deed for the purposes therein expressed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal at Allentown, Penna., on the date last above written.

EDWARD RUHE,
Notary Public.

Notary Public Commission Expires Feb. 4, 1907.

75 STATE OF PENNSYLVANIA,
County of Lehigh, ss:

I, Ira T. Erdman, Prothonotary of the Court of Common Pleas of said County, do hereby certify, that said Court is a Court of Record; that Edward Ruhe before whom the within or foregoing affidavit and acknowledgment was taken, was at the time of taking the same, a Notary Public in and for said County and State, duly commissioned and qualified, and as such authorized by the laws of said Commonwealth to take acknowledgments and affidavits and administer oaths, that I am well acquainted with the hand-writing of the said Edward Ruhe and that his signature subscribed to said acknowledgment and affidavit is genuine.

In testimony whereof, I have hereunto set my hand and the seal of the said Court, at the City of Allentown, in said County and State, this 14th day of April A. D. one thousand nine hundred and three (1903).

[SEAL.]

IRA T. ERDMAN, *Prothonotary.*
 Per WM. H. SNYDER, *Deputy.*

STATE OF OHIO,
County of Paulding, ss:

On this 31st day of March A. D., 1903, before me a Notary Public within and for said County, personally came Stephen H. Balliet and Florence M. Balliet his wife personally to me known to be the identical persons whose names are affixed to the above instrument and severally acknowledged the execution of the same to be their voluntary act and deed for the purposes therein expressed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at on the date last above written.

(Signed)

JOHN S. SNOOK,
Notary Public.

76 STATE OF OHIO,
 Paulding County, ss:

I, John A. Jenkins, Clerk of the Court of Common Pleas, a Court of Law and record of said County, do hereby certify that John S. Snook before whom the annexed acknowledgement was taken, was, at its date, a Notary Public in and for said County, duly authorized by the laws of Ohio to take the same; that his commission dates December 18th A. D. 1902, and expires Dec. 17th A. D. 1905, and that I am well acquainted with his hand writing, and that his signature thereto is genuine; and that the annexed instrument is executed and acknowledged according to the laws of the State of Ohio.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said court at Paulding, Ohio, this 31st day of March, A. D., 1903.

JOHN A. JENKINS, *Clerk.*

[SEAL.]

By ———, *Deputy Clerk.*

Endorsements on back thereof: 266. Deed. Amanda C. Biery, et al., Heirs of Hiram Balliet, dec'd, To Chas. Sargeant. State of Iowa, Clay County, ss. Entered for Taxation, May 1, 1903. Wm. Barnes, County Auditor.

77 State of Iowa, Clay County, ss. Filed for Record, May 1, 1903, at 9:15 A. M., and recorded in Book 12 of Deeds, page 382. W. L. McCown, Recorder. By Anna McCown, Deputy. Chg. and sent to Cit. B'k Webb, Iowa. 125.

I never had any conversation with F. C. Gilchrist at Webb, Iowa, on or about February 26, 1902, in reference to our title to this land; I think that is the day I saw Gilchrist and Herrick at Webb; I never had any conversation with Gilchrist at any time or at any place in reference to this land or our title or interest therein. I never at any time told Herrick and Stevens or Watson and his wife at any time or place that I had abandoned my interest in this land or under the contract with Watson or that I had no further interest in it; as a matter of fact I did not at any time after the execution of the contract, bearing date February 26, 1901, abandon any interest or title in the property in dispute in this case; I have seen Exhibit No. Eleven before, and the signature F. A. Lahr appearing thereon is my genuine signature.

Cross-examination:

In 1901 and 1902 I was living at Webb, Iowa, engaged in the banking business under the co-partnership of Sargeant and Lahr and it was composed of Charles Sargeant and F. A. Lahr, and so continued until the month of April 1905; on February 26, 1903 I

had heard that Watson had given a contract to Herrick and Stevens; I do not remember Watson ever saying anything to me about it, possibly he did; Brownlee and I had some talk about it; I do not recall the conversation.

Q. But you knew as a matter of fact enough about that contract to tell Brownlee to go out there and see Watson and get an order and helped him to get that order and had the order in your bank, didn't you?

A. Yes, sir.

78 Q. And you advised Brownlee that Herrick and Stevens had bought the land and there was money due Watson from them and you could get it that way didn't you?

Objected to as not cross examination, incompetent, immaterial and irrelevant.

A. I don't know that I ever advised him; I don't know that I told him; I don't know that I broached the subject at all; he came there to make a collection; I know I went out with him to make a collection against Watson; Watson, I think gave an order on Herrick and Stevens for the money, and I suppose I knew that; that order, if I remember right was given under certain conditions.

Q. Well didn't you know that that was given to get some of the money for the purchase of the land?

A. Well, if they ever sold it—if he ever sold it or Herrick and Stevens ever bought it; I suppose it did.

Q. What were you doing and what were your getting an order on Herrick & Stevens on it for if they had not purchased the land?

Objected to as not cross examination, incompetent, immaterial and irrelevant.

A. Well, they had sold as I told you, then under contract, as I supposed; I had no knowledge of it at that time, only what I had been told; that was my impression; I do not recall the date when I went out with Brownlee; it was before Herrick and Gilchrist were out there, and when I saw Herrick and Gilchrist and Watson talking there that day all together I sent for Watson and advised him as to what to do in the matter.

Q. And that was after you had gone out and got this order on Herrick and Stevens was it not?

A. I think it was, if I remember right.

Q. That was after you knew that that order was out calling them to pay on that contract, was it not?

A. Yes sir.

Q. You didn't know of any other reason why Herrick and Stevens could pay that order did you?

79 —. Oh, no, no sir; I understood that part of it and that order was taken to my bank and kept there for collection.

CHARLES SARGEANT testified for the defendant- as follows:

My name is Charles Sargeant; I am one of the defendants; am a farmer and reside at Gilmore, Pocahontas County; I have been living there on the farm since 1902; I lived in the town of Webb

from the fall of 1889 to the spring of 1902; was engaged in the banking and machinery business; I got acquainted with Watson in 1900; I saw Watson sign Exhibit No. 13; I think Mr. Post had the sale of the land, and spoke of it and I went out with him to see them, and he said the title was not very good and I wrote out a receipt for \$5.00 and he signed it; as it states there he was to complete the title; I understood that the title was not very good; I heard that; I wrote the receipt and as it states there it was part payment cash receipt of part of the purchase money of the land.

Q. What I want is the talk, what you said, and what Watson said. Relate the conversation.

A. Why, he was to complete the title—he said there was a defect in the title; he was to furnish a satisfactory abstract, and he was to pay something towards completing or furnishing this abstract; that is he was to pay something towards getting this title that was held by the heirs in Pennsylvania.

Plaintiffs offered in evidence Exhibit No. 13, which is as follows:

4-3-900.

Received of Sargeant and Lahr Five Dollars as part payment on the East one-half of the Southeast Quarter Section 11-94-35, Greenfield Township, Clay County, Iowa. Balance to be paid when satisfactory abstract is furnished.
\$5.00.

JOHN F. WATSON.

80 I saw John F. Watson sign Exhibit No. 11.

Q. You may tell how much money you have paid, if any, on this contract to Watson?

A. We have completed the contract; I don't remember the figures to this; I haven't it in mind—We paid him \$1295.00 March 1, 1903; that makes \$1300.00 we have paid him; we paid him \$5.00 the day the contract was signed and about the 1st of March, or near the first of March, probably the 2nd or 3rd of March of 1903 we paid him the balance of \$1295.00.

Q. Now, I notice the provision in this contract that the party of the first part agrees to perfect title on above piece before March 1, 1902, as there is now an imperfect title on same, unless same is perfected party of the second part has it or not at their option. Did you and Watson at the time you entered into this contract have any conversation in reference to this clause of this contract?

A. Yes sir; Watson told me that he would pay at least \$100.00 toward perfecting title and for me to do all I could to get it straightened up; Watson told me that the day this contract bears date.

Q. Now, what imperfections in the title was there that was the subject of the conversation between you and Watson?

A. There was a chain of title owned by the Balliet heirs at Allentown, Pennsylvania, I did things after January 26, 1901 and prior to March, 1902, in reference to perfecting the title; I went to Pennsylvania before March 1, 1902, and I left them an offer for this land and one of the heirs Stephen Balliett lived at Ted, Ohio, the other

heirs said they usually left everything to him, and they would not accept my offer until after they heard from him; I left them an offer for it; I came home and got several letters from the people at Allentown and they could not locate their brother; before I went East to Pennsylvania Watson said for me to go and that he would pay at least \$100.00 and more if it was an expensive affair to get it

81 fixed; on my return I saw Watson and had a conversation with him; he said that he did not think that we could get this matter fixed up so he could move by the 1st of March, 1902; he said that he was going to move and he could not build and he would like to stay there if he could, and I told him if we got the farm we would rent it and we would as soon rent it to him as anybody; Watson said that he would pay one-third of the crop for the rent and in case this matter was fixed up soon after the 1st of March, Mr. Watson was to get his money and give us one-third of the crop for rent and if we did not get it until toward the last of the year Mr. Watson was not to have any more money until the 1st day of March, 1903. Watson said that he would rent it; Watson said that he would rent the place and for us to keep on working at this title; he said that about two weeks before the 1st of March; he spoke about renting it; March, 1902, he said for me to keep on and try to fix the title; afterwards I received letters from time to time from the Balliet heirs and they did not give me any definite answer because they could not hear from a brother who lived at Ted; I continued to write letters to them, endeavoring to get the Balliet title; I got the Balliet title, the deed from the Balliet heirs in 1903; I think we got statements they would accept our offer after January; I have got these letters but they are at home; the signature- John Watson and Eva Watson appearing upon Exhibit No. 12 is the genuine signature- of John Watson and his wife Eva Watson; I know J. L. Addington, a justice of the peace who lives in the Town of Webb, and the signature J. L. Addington on Exhibit No. 12 is the genuine signature of the said Addington; I received Exhibit No. 12 from Mr. Watson on the 3rd or 4th of March, 1903; it is my impression that Mr. Addington went out to the farm so Mrs. Watson could sign it; I think she could not come in; Watson came in the next day with the deed and said he was ready to close the contract; Watson didn't say but what

82 it was all right; Between March 1, 1902, and March 1, 1903.

I did have a conversation with John Watson in reference to the Sargeant and Lahr and myself complying with the terms of Exhibit No. 11; the contract of sale and as to whether or not I abandoned that contract or whether or not I agreed to perform it; Watson would come in and ask us if we had heard anything further; if we had heard anything we told him; heard anything from the Balliets about the title; the first month when I was there he inquired every time he was in town perhaps, regularly, perhaps once a week; I could not say how many times he inquired during that year, and I left there the first of March, 1902, but returned in the summer; I saw him the day before the deed was dated; near March, 1903, in Webb; at the time I paid him the money; at no time during that year did I tell Watson and his wife that I abandoned that contract,

and that I would not perform it; at no time during that year from March 1, 1902, to March 1, 1903, did I tell Herrick and Stevens that I had abandoned that contract and would not perform —; I did not at any time or at any place tell any person that I had abandoned that contract and that I would not perform it; it was not my intention or purpose or conclusion to abandon that contract, and not to perform it, and not to pay Watson the price provided for in the contract; I did not in the month of June, 1902, or at any time ever have a conversation with Mr. Herrick the plaintiff in this case in the post-office at Marathon that I would quit claim my interest in that land; I did not at that time and place or at any other time and place tell Herrick that he had contracted for the land but would quit claim; I did not at that time, place or at any other time ever tell Herrick or Stevens that I had told Watson that I would quit claim that property and abandon our interest in or under the terms of the contract; I did have a conversation with Stevens at the depot at Marathon in October, 1902; Stevens said they had purchased the Watson land and he asked me if I would release it; I told him we would not release anything if we got the other chain of title, but if we could not get it we would release it and not give him any trouble; that was in October, 1902; I asked him if they got it when their contract would be fulfilled, and he said the next March; I asked him about their contract, and he said it was to be closed the March after; that is, March, 1903; he said they had a contract with Watson and he asked if we would release and I told him we would not release anything if we could get the other chain of title; if not we would, and not give him any trouble, and I asked him when his contract was to be completed and he said March, 1903; Stevens in October, 1902, told me that he had a contract with Watson for the purchase of this land and asked me if I would release my interest in it and I said I would not release if we could get the other chain of title; I do not remember of anything else being said in that conversation, concerning this land; I had another conversation with Herrick or Stevens; I was called to the telephone by Stevens, I think it was the 3rd of March or the 3rd day of February, 1903; he asked me if we would release that land, and I told him we would not, we had got the other chain of title; he said all right we will make you release it at your own expense; Stevens was at Marathon and I was at Webb, and I talked to him over the telephone, that was all that was said; I was in Ney's drug store in the town of Webb; I never had any other or different conversation with either Herrick or Stevens in reference to quit claiming my interest in this land; I was not in the postoffice in Marathon in June, 1902, or July; I do not remember as to August; I never had any conversation with Herrick in the postoffice in the town of Marathon respecting this land; in the spring and summer and in June, 1902, I was in the State of Washington; I left Clay County that year the first of April and did not return until July, 1902.

84 Cross-examination:

I am a farmer now and commenced the banking business January, 1900, and quit in March, 1902; at the time I bought this 80

acres of land in January, 1900, I paid \$5.00 to Watson; he was in our place of business I might be confused as to dates, whether it was 1900 or 1901; I think it was January, 1901; I saw Watson sign the contract and I signed it and my partner F. A. Lahr signed it; Mrs. Watson did not sign it; they were living out there; that was their home out on the farm; and I went out and looked over the farm a few days before the contract was made; I drew the contract; Watson was to pay at least \$100.00 toward perfecting the title.

Redirect examination:

Q. Who has paid the taxes on this property since March 1, 1902?

A. Mr. Lahr usually paid the taxes from Webb he looked after them; I presume the receipts are here; I don't know.

Q. You may examine Exhibits Nos. 14 and 15 and state whether these are the tax receipts for the taxes on this property, being the property in dispute for the year 1902?

A. They are. Exhibits 14 and 15.

I never at any time had any talk or conversation or agreement, either in writing or otherwise, whereby I agreed to buy for the benefit or use of Watson and his wife or any other parties, the title or interest of the Balliet heirs in this property in dispute in this case.

Q. Judge Helsell yesterday asked you several questions, whether or not it was not your agreement or talk with Watson to buy the Balliet title for Watson: Did you understand, or do you mean to answer and say that it was your intention and purpose to buy the Balliet title for Mr. Watson.

A. I did not mean to answer that we were to buy the title for Mr. Watson, we were buying it for ourselves. We paid
85 \$525.00 for the Balliet title to the heirs of Hiram Balliet for the conveyance of the interest described in the deed, identified as Exhibit No. 9.

Recross-examination:

Mr. Lahr paid it; it was paid from Webb by Mr. Lahr; it was charged to my account; Mr. Lahr was in the bank at Webb and he sent the money; I did not see him send the money; I have taken his word for it and paid my share of it to Mr. Lahr.

The defendant offered and introduced in evidence and read into the record page 382 and page 383 of Deed Record No. 12, the same being the quit claim deed from Amanda C. Biery et al., to the premises in dispute, the grantee named in said deed being Charles Sargeant.

It is agreed by the parties hereto that Deed Record No. 10 is a record in the office of the Recorder of Clay County, Iowa, and the further identification of said Record No. 10 was waived, and the defendants read from the said Deed Record No. 10 in evidence, and offered pages 149 and 150 thereof in evidence, the same being the record of the land contract, bearing date January 26, 1901, between John Watson of the first part, and Sargeant and Lahr of the second

part, which contract was filed for record on January 28, 1901, at 4:30 o'clock P. M., as shown upon page 150 of said records.

It was agreed by the parties hereto that Deed Record No. 13 is a record in the office of the Recorder of Clay County, Iowa, and the further identification of said record was waived and the defendants offered in evidence and read into the record page 63 thereof, the same being a deed from John Watson and Eva Watson his wife to Charles Sargeant and F. A. Lahr for the premises described in plaintiffs' petition; and also that portion of said page which showed said deed was filed for record on the 3rd day of March, A. D. 1903 at 5:20 o'clock P. M.

JOHN MCWHIRTER, testified for the plaintiffs as follows:

My name is John McWhirter; I am the county treasurer of Clay County. Exhibits No. 14 and 15 and tax receipts are in the handwriting of a man named J. Messenger, who was the former county treasurer of Clay County. Said Exhibits No. 14 is the tax receipt dated, Spencer, Iowa, March 31, 1903. No. 49 is a receipt from Sargeant and Lahr of \$17.54 for the 1902 tax upon the property in dispute herein.

Exhibit No. 15 is a tax receipt dated Spencer, Iowa, 3-23-1904. Receipt for \$20.00 from Sargeant and Lahr for the 1903 taxes for the premises in dispute.

ROBERT NEY, testified for the defendant as follows:

I formerly resided at Webb, Iowa, and conducted a drugstore there; there was a telephone booth in the drugstore there and in 1903 Charles Sargeant came to my drugstore in Webb to have a telephone conversation with Mr. Herrick, or Mr. Stevens; I understood it to be Mr. Stevens at the other end; I just heard Sargeant's replies.

Q. How did you know Sargeant was talking to Stevens and Herrick?

A. Because I had a call from them, a call from them for Mr. Sargeant, from Herrick and Stevens or one of the firm; I heard Sargeant tell them that he would not release his contract, words to that effect; I could hear him say no and yes; a few words, that way, that is all I remember.

Cross-examination:

I was listening to what was said; Mr. Sargeant requested me to stand there; I do not know whether he requested me to listen or not; he said wait here, or words to that effect; I know he wanted me to stay there; there was reference made to a contract; he said he would not release the contract, or words to that effect; that was in 1903; I should think in the middle of the winter.

The defendant offered and read in evidence Exhibits Nos. 14 and 15 the same being the tax receipts above referred to

CHARLES SARGEANT, recalled testified for the defendants as follows:

A man named Woods is now living upon the land in dispute under a written lease, made the first day of March this year, 1905; he is living on the land as our tenant, yes sir. I never got Watson to go to Wisconsin. I never asked him to go to Wisconsin; never told him to go to Wisconsin.

Defendants rest.

The plaintiffs offered in evidence Exhibit No. D, which is as follows:

159,113.

B.

4-207 R.

M. F. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 25, 1905.

I hereby certify that the annexed copy of papers filed with Des Moines, Iowa, Cash Entry No. 22029 is a true and literal exemplification of the original papers in this office.

In testimony whereof I have hereunto subscribed my name
88 and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[SEAL.]

(Signed)

C. H. BUSH.

Recorder of the General Land Office.

STATE OF IOWA,
Clay County, ss:

To the Commissioner of the General Land Office, Des Moines, Iowa:

I, F. A. Lahr on oath say that Charles Sargeant and this affiant are the absolute and unqualified owners of the east half of the southeast quarter of Section eleven Township ninety four (94) Range thirty five (35) west of the 5th P. M. Iowa; said tract of land having been located by Hartzell I. Schaffer at the Sioux City land office June 15th, 1857 with warrant No. 27,622 under the act of 1855, and upon which the Registers and Receivers certificate of location Number 4,732 was issued.

I further say that the said Charles Sargeant and this affiant have acquired all of the interest of the said Hartzell I. Schaffer and all other persons who had or claimed any interest in and to said above described premises.

The affiant further states that he is informed and credibly believes that no patent was ever issued by the General Government to the said Hartzell I. Schaffer or his successors in interest upon said above described premises and the said Charles Sargeant and this affiant hereby claim title to said above described premises and make this their application to make a cash substitution and ask for the issuance of a

89 patent to the said above described premises in the name of this
affiant and the said Charles Sargeant or in the name of Amos
Stanley.

F. A. LAHR.

Subscribed and sworn to before me by the said F. A. Lahr, this
8th day of February, A. D., 1904.

[SEAL.]

ACKLEY HUBBARD.

Notary Public in and for Clay County, Iowa.

Endorsement: Filed Feb. 15, 1904. T. S. H. Reg.

STATE OF IOWA,

Webster County, ss:

To the Commissioner of the General Land Office, Des Moines, Iowa:

I, Chas. Sargeant on oath say that F. A. Lahr and this affiant are the absolute and unqualified owners of the east half of the south east quarter of section eleven Township ninety four (94) Range thirty five (35) west of the 5th P. M. Iowa, said tract of land having been located by Hartzell J. Schaffer at the Sioux City Land Office June 15th, 1857, with warrant number 27,622 under the act of 1855, and upon which the Registers and Receivers certificate of location Number 4,732 was issued.

I further state that the said F. A. Lahr and this affiant have acquired all of the interest of said Hartzell J. Schaffer and all other persons who had or claim any interest in and to said above described premises.

The affiant further states that he is informed and credibly believes that no patent was ever issued by the General Government to the — Hartzell J. Schaffer or his successors in interest
90 upon said land above described and the said F. A. Lahr and this affiant hereby claim title to said above described premises and make this application to make a cash substitution and ask for the issuance of a patent to the said above described premises in the name of this affiant and the said F. A. Lahr or in the name of Amos Stanley.

CHAS. SARGEANT.

Subscribed and sworn to before me by the said Chas. Sargeant this
11th day of February, A. D., 1904.

[SEAL.]

GEO. BRUMMER.

Notary Public in and for said County.

Endorsement: Filed Feb. 15, 1904. T. S. H. Reg.

Military Bounty Land Act of March 3, 1855.

REGISTER'S OFFICE.

SIoux CITY, June 15, 1857.

Military land warrant No. 27622, in the name of Jacob Hutson has this day been located by Hartzell J. Schaffer upon the East 1/2 of

Southeast quarter section 11, in Township 94 of Range 35 W, subject to any pre-emption claim which may be filed for said land within forty days from this date.

Contents of tract located, 80 acres.

S. P. YOEMANS, *Register*.

Suspd. see D. & Ch. A. 2 198.

1 37631. Mch. 7, 1871, filed by R. W. Walker, Washington, D. C.

For value received, I. H. J. Schaffer, to whom the within certificate of location was issued, do hereby sell and assign unto Amos Stanley, and to his heirs and assigns forever, the said certificate of location, and the warrant and land therein described, and authorize him to receive the patent therefor.

Witness my hand and seal this 24 day of February, 1858.

Attest:

I. J. SCHAFFER. [SEAL.]

E. N. SLENT.
J. L. HANNA.

STATE OF OHIO,

County of Mahoning:

On this 24 day of February, 1858, before me, personally came Hartzell J. Schaffer, to me well known, and acknowledged the foregoing assignment to be his act and deed; and I certify that the said Hartzell J. Schaffer is the identical person to whom the within-named warrant was issued.

[SEAL.]

JOSEPH L. HANNA,
Notary Public.

Land Warrant No. 27,622 4-002 Register and Receiver's No. 4732.

Military Bounty Act of March 3, 1855.

U. S. LAND OFFICE,
SIOUX CITY, June 15, 1857.

We hereby certify that the attached Military Bounty Land Warrant No. 27622 was on this day received at this office, from Hartzell J. Schaffer of Stark County, State of Ohio.

S. P. YOEMANS, *Register*.
A. BEECH, *Receiver*.

Des Moines Cash No. 22029 substituted Febr'y 15, 1904.

I, Hartzell J. Schaffer of Stark County, State of Ohio, hereby apply to locate and do locate the East half of south east quarter of section No. 11, in township No. 94 of Range No. 35, in the

92 district of lands subject to sale at the Land Office at Sioux City, containing 80 acres in satisfaction of the attached Warrant number 27622, issued under the Act of March 3, 1855.
Witness my hand this 15th day of June, A. D., 1857.

HARTZELL J. SCHAFFER.

S. P. YOEMANS, *Register*.

A. LEECH, *Receiver*.

I request the patent to be sent to — — —.

U. S. LAND OFFICE,
SIOUX CITY, IOWA, *June 15th*, 1857.

We hereby Certify that the above location is correct, being in accordance with law and instruction.

A. LEECH, *Receiver*.

S. P. YOEMANS, *Register*.

4660blm 10-97.

Endorsements on back: No. 27622. 80 Acres. Act of March 3, 1855. June 1, 1857. Located at Sioux City. Des Moines cash 22029 subst. suspended. Duplicate filed by R. W. Walker, Washington, D. C. 137,631. No conflict of record. Location approved. May 16, 1885. J. W. L. Patented — 189—. A. 2. Recorded Vol. — Page 198. Transmitted to — — —. R. & R. No. 4732.

93

W. G. W.

4—131.

No. 22029.

RECEIVER'S OFFICE AT DES MOINES, IOWA,
February 15, 1904.

Received from F. A. Lahr & Charles Sargeant, for Amos Stanley of Cherokee, County of Cherokee, Ia., the sum of one hundred dollars and — cents; being in full for the Government price (as authorized by Commissioner's letter "B" dated January 23, 1904).

E. $\frac{1}{2}$ of S. E. quarter of Section No. 11, in Township No. 94, of Range No. 35 containing 80 acres and — hundredths, at \$1.25 per acre.

STEPHEN J. LOUGHRAN, *Receiver*.

\$100.00.

Substituted in lieu of Sioux City Register and Receiver's certificate 4732, founded upon Warrant No. 27622 (80 acres, Act of 1855.

\$ — testimony fee received. Number of written words, —. Rate per 100 words, — cents.

K. M. S.

(4-189.)

No. 22029.

LAND OFFICE AT DES MOINES, IOWA,
February 15, 1904.

It Is Hereby Certified that, in pursuance of law, Amos Stanley residing at —, in — County, State of —, on this day purchase of the Register of this Office the E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of Section No. 11 in Township No. 94 N. of Range No. 35, W. of the 5th Principal Meridian, Iowa, containing 80 acres, at the rate of one dollar and 25 cents per acre, amounting to 100 & no/00 dollars, and — cents for which the said Amos Stanley has made payment in full as required by law.

94 Now therefore be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Amos Stanley shall be entitled to receive a Patent for the lot described.

THORNTON S. HOWARD, *Register*.

Substitution in lieu of Sioux City Register and Receiver's certificate 4732 founded upon warrant 27622 (80 acres act of 1885E) Hon. Comm. Letter.

Preference had to 1905-197328 "B" dated January 23, 1904.

Endorsements on back: M. L. 157927. (4-189.) No. 22029 Cash entry. Land office at Des Moines, Iowa. Sec. 11, Town. 94, Range 35. Cash substitution for Wt. 27622 80-55 Noted in Div. "B" J. F. A. Transmitted patent Sep. 14, 1904, to register & receiver. Record of patent agrees with the paper. Approved July 23, 1904, Ex., by A. J. S., Clerk. Division C. Patented Aug. 23, 1904. Recorded, Vol. 96, Page 245. 57-214. 6—390. (95-50,000.) 27622.

95 Mr. HELSELL: It is admitted that Book S. produced is the general record of Deeds for 1885 for Clay County, Iowa.

And the plaintiffs offer in evidence the deed and the record as shown in Book S. of Deeds on page 203, being a deed from Hartzell J. Schaffer to W. Patterson and reads the same in evidence.

To which the defendants objected as being incompetent, immaterial and irrelevant, not proper rebuttal evidence, and if competent at all is competent as a part of plaintiffs' main case.

The plaintiffs offer in evidence Book R. of Deeds of Clay County, Iowa, being the record found on pages 92 and 93 of said Record of Deeds dated on or about March 23, 1885 from G. W. Patterson, a single man to M. E. Griffin, and the plaintiffs offer and read the same in evidence.

To which the defendants made the same objection as made to the last preceding offer. This objection, however, was not raised as to the identification.

The plaintiffs offer in evidence the record of Clay County Book

R. Deeds, pages 95 and 96, having reference to a deed dated March 30, 1885, from M. E. Griffin, a single man to O. C. Ainsworth, the book being admitted to be the Deed Record of Clay County, Iowa.

To which the defendants make the same objection as made in the last preceding offer.

The plaintiffs offer in evidence pages 281 of Deed Record S. being quit claim deed of April 15, 1885, to Washington L. Simmons and read the same in evidence.

To which the defendants made the same objection as made to the last preceding offer.

The plaintiffs offer in evidence from the same record, page 321, deed dated on or about July 10, 1885, from Hartzell J. Schaeffer and wife to G. W. Patterson.

96 To which the defendants make the same objection as made to the last preceding offer.

The plaintiffs offer in evidence from Book 3 Deed Records, Clay County, Iowa, admitted to be the original genuine record page 448 thereof, being a contract from D. Hartley Richards to Carleton Woodard.

To which offer the defendants made the same objection as made to the last preceding offer.

Plaintiffs offer in evidence page 36 of Deed Record 6 of Clay County, Iowa, the same being a deed from J. B. Lewis, sheriff, to Mary E. Ainsworth.

To which the defendants made the same objection as made to the last preceding offer.

Plaintiffs offer in evidence Deed Record 35, page 110, the same being a mortgage from John F. Watson and wife to Horatio N. Woodard.

It was conceded by both parties that the exhibit identified as plaintiffs Exhibit "E" is a correct and true showing of the description payments, and by whom paid, of the taxes on the land in controversy, as shown by the treasurer's books of Clay County, Iowa, the same having been prepared by the county treasurer, and this exhibit is admitted with the same force and effect as if the original books themselves duly identified were produced in court and introduced in evidence, from the years 1890 to 1905.

The last five entries upon said Exhibit "E" showing that in 1901 and 1902 the taxes were paid by John F. Watson and in 1903 and 1904, and 1905 the taxes were paid by Sergeant and Lahr.

R. A. BROWNLEE testified, being produced, sworn and examined on behalf of the plaintiffs in rebuttal, as follows:

97 I reside at Mallard, Iowa, know Sergeant and Lahr and in 1902 was a collector for the McCormick Harvester Company; Sergeant and Lahr had charge of our local collections at Webb at that time; I had a talk with Mr. Lahr; he told me that Watson sold the farm to Herrick and Stevens; he suggested that I get an order on Herrick and Stevens on Watson for the amount of the claim; Lahr went out with me to Watson's place to see him in regard to getting this order; Lahr explained to him that the fact

of his having sold his place and going to move to Wisconsin that the Harvester Company would expect him to settle his notes, that were not yet due, given the year previous for a binder that he had bought; and he told him he thought the best way to do that would be to give an order payable March 1, at the time he was to get his money.

Q. And did he give you an order on Herrick and Stevens?

A. Not that day; he gave me an order the next day; Watson gave an order; I took the order to Herrick and Stevens at Marathon and had them accept it; my recollection is that Herrick signed the order with the firm name; I took it back to Webb and left it with the Watson notes; the two unpaid notes in the possession of the bank, or of Mr. Lahr; shortly after that I went into another territory; the last time I saw the order it was in the possession of the bank of Webb, filed in the note case with the Watson notes, the Sargeant and Lahr bank; I gave it to Mr. Lahr to attach to the note.

John F. Watson- Testimony.

I am one of the parties who signed certain contracts in regard to the East one-half of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Eleven (11), Greenfield Township; I remember along about the 1st of March or the 3rd of March or the 4th of March making out a deed of that land to Sargeant and Lahr in our house on that land;

Sargeant said that he would see that I didn't lose anything 98 by it; he said he would see I didn't lose anything by it;

Sargeant was not out there the day the deed was signed by me and my wife; I did not ask Addington to go out to my house; I was in town and I rode out with him; he said he wanted me to go along out and make out a deed for the land out to our place; he didn't say anything as to who asked him to go out; the money was not paid for the deed at the house; the deed was taken back to Webb by Addington; they gave me the money for the deed right here in the court house in Spencer; no draft on the bank at Webb.

Q. But on that day a draft was given to you after they had brought you along up here to Spencer and had of record their deed, is that right?

A. No sir. I was brought up to see whether there was anything of record ahead of it, and they give me the draft right outside of the recorder's office; I put the draft in my pocket; I took it down to Webb and gave it to Frank Lahr.

Q. And when did you go to Wisconsin, John?

A. I think I loaded the 6th of March.

Q. You got right out and went up there? Now, before you left you got a couple of hundred dollars of them, didn't you?

A. Yes sir.

Q. And after you got up in Wisconsin, Post brought you \$700.00 more didn't he?

A. Well, not quite \$700.00, there was \$135.00 I received from Herrick; I left \$135.00 with Frank Post to send to Herrick and Stevens.

Q. In other words, they kept back and they gave to Post to give to Herrick and Stevens \$135.00?

A. Yes sir.

Q. Did you tell them anything about Herrick having paid you any money?

A. Yes sir, I told them he had paid me \$100.00 down on it; I never employed Mr. Healy to appear for me in this case; I have never signed any papers dismissing this case.

Q. Well, as a matter of fact I will say for your information that Mr. Healy filed a paper here that I presume you signed, dismissing this case. Who got that paper of you?

A. I don't think I ever signed a paper; I have no recollection.

Q. Did you ever sign a paper, John, dismissing this case, knowing that that was the purpose of it?

A. No, sir.

Q. I show you a paper marked Exhibit "F" and ask if that is not your signature there. It appears to have been sworn to before somebody up in Wisconsin?

A. Oh, that, yes, sir, I recollect signing that in Wisconsin, now.

Q. Well, what was that and how came you to sign it?

A. Mr. Lahr sent it to me.

Q. Did you know what it was?

A. Well, I read it over; I didn't know what it was for at the time.

Q. You didn't know what it was for at the time?

A. They said there was trouble—I knew it was about this piece of land; I knew they were having trouble with Patterson over it, and I supposed it was the same thing. I never told Robert Healy or any member of his firm to file this paper for me; never had any talk with them about it; never told Sargeant and Lahr that they might file the paper, not to my knowledge.

Q. Did you know that so far as the record appeared that the paper that I have shown you had been brought here to this court and filed by Robert Healy, apparently dismissing you out of this case?

A. No sir.

Q. And that was not done under your direction or with your consent?

A. That paper was sent to me in Wisconsin and I was ordered to go in front of a notary, and get it signed, and I did so.

Q. You were just simply ordered by Lahr?

A. Well, he wrote a letter to that effect.

Cross-examination:

I can understand, read and write the English language; I can read and write the English language fluently.

Q. You read the top line of that Exhibit F, read it out loud?

100 A. In the district Court of the State of Iowa in and for Clay County. (The witness then read aloud in open court the dismissal identified as Exhibit No. F.) My knowledge of the English language is no more comprehensive on the 31st day of October, 1905, than it was on the 3rd day of August, 1903.

Q. You had and possessed the faculty of signing any paper that was presented to you, didn't you?

A. Pretty near.

When I say that I took this draft back and gave it to Frank Lahr, I mean that I deposited it in the bank at Webb."

EXHIBIT No. 8

is as follows:

Affidavit.

STATE OF IOWA,
County of Clay, ss:

The undersigned, Charles Sargent and F. A. Lahr, being duly sworn, depose and say that their residence and postoffice address is at Webb, Clay Co., Iowa; that on the 26th day of January 1901 they were members of and composing the firm of Sargeant & Lahr; that on or about the 26th day of January 1901, they entered into a contract with one John Watson of said Clay County, Iowa, for the purchase from the said John Watson of the East half of the South-east Quarter of Section Eleven (11), Township Ninety four (94), North Range Thirty five (35), West of the Fifth P. M., which contract was recorded in the office of the Recorder of Deeds of said county on the 28th day of January 1901, in Book 10 on page 149 thereof; and which contract provides among other things for a certain payment to be made on March 1st, 1902, and further that in case title to the premises should not be fully perfected by that date,

then said purchasers could take the land or not at their own
101 option; that on said date title was not fully perfected to meet the demands of purchasers and they refused to make said payment or any part thereof, or to take possession of said lands or any part thereof, and they did then surrender fully all rights under said contract to said Watson, who continued in possession of the lands, and the parties to said contract fully cancelled and held for naught the said contract and all rights growing out of it, which cancellation was mutual and by agreement and express understanding; and this affidavit is now given in order to relieve the title to the said land by any cloud or claim under said contract.

Subscribed in my presence and sworn to before me, by the said Charles Sargeant and F. A. Lahr, this — day of — 1902.

Notary Public in and for said County and State.

EXHIBIT No. 12,

introduced by the defendants is a warranty deed from John Watson and wife, conveying the premises in dispute and is as follows:

Warranty Deed.

Know all men by these presents:

That John Watson and Eva Watson, his wife, of Clay County, and State of Iowa, in consideration of the sum of Eleven Hundred Dollars in hand paid by Chas. Sargeant and F. A. Lahr of Clay County and State of Iowa, do hereby sell and convey unto the said

Chas. Sargeant and F. A. Lahr the following described real estate, situated in the County of Clay and State of Iowa, to-wit: The east one-half ($\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of Section Eleven (11) Township Ninety-four (94) North, range thirty-five (35) West of the fifth principal Meridian.

And we hereby covenant with the said Chas. Sargeant and F. A. Lahr that we hold said premises by good and perfect title, that we have good and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever, except a certain mortgage of \$1020.00, and we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

And the said Eva Watson hereby relinquishes her rights of dower in and to the above described premises.

Signed the 3rd day of March A. D. 1903.

EVA WATSON.
JOHN WATSON.

STATE OF IOWA,

County of Clay, ss:

On this 3rd day of March 1903, before me personally appeared John Watson and Eva Watson to me known to be the identical person or persons named in and who executed the foregoing instrument, and acknowledged that (he or they) executed the same as his (or their) voluntary act and deed.

(Signed)

J. L. ADDINGTON,

Justice of the Peace in and for Clay County, Iowa.

Endorsements on back of said deed: 549. Warranty Deed. John Watson and wife to Chas. Sargeant et al. Entered for taxation the 3rd day of March 1903. Wm. Barnes, Auditor. — Deputy. Filed for record this 3rd day of March A. D. 1903 at 5:20 o'clock P. M., and recorded in Book 13, page 63 of Clay County, Iowa, records. W. L. McCown, Recorder, by (signed) Anna McCown, Deputy. Cit. Bk. Webb. Paid Mar. 3 1903.

EXHIBIT No. 11

is a contract for the sale of the premises in dispute from John Watson to Sargeant and Lahr, and is as follows:

Land Contract No. 410.

This Agreement, made this 26th day of January A. D. 1901, between John Watson of the County of Clay and State of Iowa, party of the first part, and Sargeant & Lahr of the county of Clay and State of Iowa, of the second part as follows:

The party of the first part hereby agrees to sell to the party of the second part, on the performance of the agreements of the party of the second part, as hereinafter mentioned, all his right, title and interest in and to the real estate situated in the County of Clay and State of Iowa, to-wit:

The E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section Eleven (11) Township Ninety four (94) Range Thirty Five (35) West 5th Prin. Meridian 1a. The sum of Two Thousand Three Hundred Twenty Dollars payable as hereinafter mentioned. And the said party of the second
 104 part, in consideration of the premises hereby agrees to and with the party of the first part to purchase all his right, title and interest in and to the real estate above described The E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ Section (11) Township (94) Range (35) West 5th P. M. 1a., for the sum of Two Thousand Three Hundred Twenty Dollars, and to pay said sum therefor to the party of the first part, his heirs or assigns, as follows: Five Dollars on the execution of this agreement, and the balance of Two Thousand Three Hundred Fifteen Dollars as follows, to-wit: One Thousand Two Hundred Ninety Five — March 1st, 1902 when possession is given by party of 1st part and assume a mortgage now on farm of \$1020 at 7 per cent interest, party of 1st part to pay taxes and all interest due until and including March 1st, 1902, without interest. Party of 1st part agrees to perfect title of above piece before March 1st, 1902 as there is now an imperfect title to same unless same is perfected party of 2nd part take it or not at their option. And it is expressly agreed by and between the parties hereto that the time and times of payment of said sums of money, interest and taxes as aforesaid is the essence and important part of the contract; and that if any default is made in any of the payments or agreements above mentioned to be performed by the party of the second part in consideration of the damage, injury and expense thereby resulting, or that may be incurred by or to the party of the first part thereby, this agreement shall be void and of no effect, and the party of the second part shall have no claim in law or equity against the party of the first part, nor to the above mentioned real estate, nor any part thereof; and any claim, or interest, or right, the party of the second part may have had hereunder up to that time by reason hereof, or of any payments, and improvements made hereunder, shall on all such default, cease
 105 and determine and become forfeited, without any declaration of forfeiture, re-entry or any act of the party of the first part. And if the party of the second part, or any other person or

persons shall be in the possession of said real estate, or any part thereof, he or they will peacefully, remove therefrom, or in default thereof, he or they may be treated as tenants holding over unlawfully after the expiration of a lease and may be ousted and removed as such. But if such sums of money, interest and taxes are paid as aforesaid; promptly at the time aforesaid, the party of the first part will, on receiving said money and interest, execute and deliver, at his own costs and expense, a Warranty Deed of said premises as above agreed.

Witness our hands, the day and year above written.

(Signed)

JOHN WATSON.

(Signed)

CHAS. SARGEANT.

(Signed)

F. A. LAHR.

STATE OF IOWA,

County of Clay, ss:

On this 26th day of January A. D. 1901, before me, the undersigned, H. F. Fillmore a J. P. in and for said county, personally appeared John Watson, Charles Sargeant and F. A. Lahr, to me personally known to be the identical persons whose names are affixed to the foregoing instrument as Purchaser and acknowledged the execution of the same to be their voluntary act and deed.

Witness my hand and official seal on the date last above written.

(Signed)

H. F. FILLMORE, J. P.

106 Indorsements: 216. Land Contract Between John Watson and Sargeant and Lahr. State of Iowa, Clay County, ss. Filed for Record Jan. 28, 1901, at 4:30 o'clock P. M., and Recorded in Book "10" of Deeds, page 149. W. L. McCown, Recorder. (Signed) By Anna McCown, Deputy. Bank of Webb. 80c.

End of testimony.

Under and pursuant to the stipulation filed in the District Court of Clay County, Iowa, on December 15, 1905, which stipulation is set forth on pages — and — of this abstract and the law M. C. Grier, the official shorthand reporter of the District Court of Clay County, Iowa, transcribed the official shorthand notes of the testimony and record in said cause, and the translation of said shorthand notes, as aforesaid, were on the 23rd of January, 1907, duly filed in the office of the Clerk of the District Court of Clay County, Iowa, and said original shorthand notes were duly, properly and legally certified to and signed by W. B. Quarton, Judge of the 14th Judicial District of Iowa, on the 31st day of October, 1905, and the said Matthew C. Grier the official short hand reporter of said court did on said 31st day of October, also duly, legally and properly certify to and sign said short hand notes, and thereafter the said shorthand notes were duly and correctly extended into longhand as aforesaid, by said M. C. Grier, on the 23rd day of January, and duly and legally certified to by the said Matthew C. Grier, the official shorthand reporter of said court and also attached to the translation of said shorthand notes are the certificates

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of the Honorable A. D. Bailie, Judge of the 14th Judicial District of Iowa, and F. M. Ely, official shorthand reporter of said court, said certificates being dated the 7th day of February, 1907, which certificates state and certify that said extended shorthand notes are certified to by the said Matthew C. Grier above identified and referred to contains the whole record, including oral testimony, exhibits and documentary evidence and the same are hereby made a part of the record in this case, and that all of the facts so certified by the said A. D. Bailie, trial judge and Matthew C. Grier and F. M. Ely, official shorthand reporters are hereby made a part of the record in this case and constitute the bill of exceptions. The said shorthand reporter's notes so certified to and the whole record in said cause were as aforesaid translated and extended into longhand by the said Matthew C. Grier and F. M. Ely, the official reporters of said court, and duly certified to by the said F. M. Ely and the said Matthew C. Grier and by the said Honorable A. D. Bailie, Trial Judge, as a full, true, and correct transcript of all of the oral and written testimony offered and introduced and used on said trial and identification of all exhibits and other documentary evidence, and is a full, true and correct report and transcript of all of the proceedings had on said trial and identifying and making a part of said record the said transcript, exhibits and evidence, and said transcripts and translations were duly filed in the office of the Clerk of the District Court of Clay County, Iowa, on January 23, 1907, and on the 7th day of February, 1907.

The above and foregoing abstract of the record and evidence contains all the evidence offered received and introduced on the trial of said cause, and the same is a full, true and complete abstract of the record in said cause.

108 And on the 18th day of April, 1907, the District Court of Clay County, Iowa, the Honorable A. D. Bailie, presiding entered and rendered and recorded in said cause the following

Judgment and Decree

and the same was at said time duly entered and recorded of record in said court. Said judgment and decree is as follows:

Be it remembered, That on this — day of August, 1905, the above entitled cause coming on for hearing, it being the regular August 1905 term of said Court, the plaintiffs appearing in person and with their attorneys, F. H. Helsell and F. C. Gilchrist, and the defendants appearing in person and with their attorneys, Healy Bros. and Kelleher, the Honorable W. B. Quarton, Judge, Presiding, the Court finds that after an inspection of the original notices that it has jurisdiction of the person of the parties defendant and of the subject matter of the action, receives the evidence offered in said cause, and, being fully informed in the premises, by agreement the cause is continued for Argument, and now to-wit, on the — day of January, 1907, being the regular January 1907 term of the District Court in and for Clay County, Iowa, the above cause coming on for

further hearing under stipulation in writing signed by the parties by their attorneys submitting said cause to said Court, being a regular term of said Court, and the Honorable A. D. Bailie, Judge Presiding, and it being stipulated and agreed that the evidence should be considered by said court, the Honorable W. B. Quarton having withdrawn from the consideration of said cause as per the stipulation of the parties the Court receives the evidence and becoming fully informed thereon and thereof and having heard the argument of the counsel respectively for the parties, finds

109 adjudges and decrees, and it is hereby found, adjudged and decreed that the issues and the evidence in said cause are with the plaintiffs; that at the time of the beginning of this action F. C. Gilchrist, Esquire, had full legal authority to bring said cause and to prosecute the same as brought. That the alleged dismissal of said action as to John Watson and Mrs. John Watson was obtained and made without intention or understanding of the effect thereof and that said action was legally brought and this Court has jurisdiction of the parties thereto. That at said time when this action was brought, March 6th, 1903, John Watson held the legal title and ownership to the East Half (E. $\frac{1}{2}$) of the South-east quarter (S. E. $\frac{1}{4}$) of Section No. Eleven (11), Township No. Ninety-four (94), Range No. Thirty-five (35) West of the 5th P. M. Iowa, as between the parties to this action, subject to a certain contract recited in the amended and substituted petition of the plaintiff made and executed by John Watson and Eva Watson, his wife, and C. E. Herrick and D. B. Stevens, for the conveyance of said land upon the fulfillment of the terms of said contract to the said C. E. Herrick and D. B. Stevens by said John Watson and wife.

And it is found, adjudged and decreed that the contracts claimed by the defendants Sargeant and Lahr as having previously been made including a certain contract dated January 26th, 1901, and recorded in Book 10, page 149, of the Clay County, Iowa, records made by John Watson to Sargeant and Lahr had been on the said 13th day of June, 1902, and before said time each and both completely abandoned and cancelled by agreement of the parties thereto, and the same at the time of making of said contract between John Watson and wife and Herrick and Stevens on the 13th day of June, 1902, there was no valid, legal outstanding contract for the conveyance of said land, as between John Watson, or John Watson
110 and wife and Sargeant and Lahr or between Watson and wife and Chas. Sargeant and F. A. Lahr.

And it is further found adjudged and decreed that a certain deed, obtained from John Watson and wife to Sargeant and Lahr conveying said land dated March 3rd of the year 1903, and recorded in Book 13, Page 63 of the Clay County Iowa Records, was obtained by Chas. Sargeant and F. A. Lahr with full and certain and complete knowledge of the existence of the contract and the claims of the plaintiffs, Herrick and Stevens, thereunder and was obtained with fraudulent intent and for the purpose of preventing the completion of the contract between Watson and wife and Herrick and Stevens, and with full knowledge of the rights of Herrick and

Stevens under their said contract, and said deed so dated, executed and recorded, is hereby declared to be invalid as against the rights of Herrick and Stevens and the same as to them is declared void, illegal, and is set aside.

And it is further held, adjudged and decreed that on or about the 26th of February, 1903, a further and supplemental contract was entered into between John F. Watson and Eva Watson and C. E. Herrick and D. B. Stevens, supplemental to the contract hereinbefore mentioned, dated the 13th of June, 1902, in which it was agreed as alleged in the petition for the prosecution of this cause and for the relieving of the said Herrick and Stevens for the payment of interest on deferred claims until the determination of this cause, as claimed in the petition.

It is further found, adjudged and decreed that a certain patent from the United States of America, dated the 23rd day of August, 1904, issued to one Amos Stanley, was procured by Sargeant and Lahr, defendants, in lieu of warrant of location on said land and that the same was procured by misrepresentation and fraud on the part of said Sargeant and Lahr, and at a time when they had full and complete notice of the rights of the plaintiffs, Herrick
111 and Stevens, and as against the rights in equity of Herrick and Stevens, and that said patent was procured by them by agreement so to do between Watson and Sargeant and Lahr and was procured in trust for said Watson and for the perfection of his, the said Watson's title, the same is declared as null and void and the same as against the rights is set aside, and it is adjudged and decreed that thereunder Sargeant and Lahr and neither of them obtained any valid right or title or interest to or in said land.

It is further found, adjudged and decreed that the title to said land as of date of said beginning of this action is declared to have been in John Watson, subject to the contract aforesaid with C. E. Herrick and D. B. Stevens and is found that there is due on said contract to John Watson the sum of Nine Hundred Dollars (\$900.00) and it is ordered, adjudged and decreed that on the payment of said Nine Hundred Dollars (\$900.00) by said C. E. Herrick and D. B. Stevens, with interest at 6 per cent thereon from this date that said John Watson and wife, Eva Watson, and said Chas. Sargeant and F. A. Lahr and Mrs. F. A. Lahr shall execute deeds or a joint deed conveying the East Half (E. $\frac{1}{2}$) of the South-east quarter (S. E. $\frac{1}{4}$) of Section No. Eleven (11), Township No. Ninety-four (94), Range No. Thirty-five (35), West of the 5th P. M., Iowa, to the said C. E. Herrick and D. B. Stevens — are given until the 15th day of May, 1907, in which to pay said amount and on the payment of said sum to the clerk of this Court for the use and benefit of John Watson and Chas. Sargeant and F. A. Lahr, if the said John Watson and Eva Watson his wife, or the said Chas. Sargeant and F. A. Lahr and Mrs. F. A. Lahr shall fail or refuse to deposit with said clerk deeds conveying title to said land to said Herrick and Stevens, Charles S. Weaver, the clerk of this Court, is hereby appointed and commissioned in their name and stead and

112 empowered to convey to said C. E. Herrick and D. B. Stevens said land in lieu of and in place of John Watson and Mrs. John Watson and Chas. Sargeant and F. A. Lahr, and Mrs. F. A. Lahr, conveying thereby absolutely all joint and several interests of said parties to said C. E. Herrick and D. B. Stevens, and said conveyance shall convey absolute title of each and all the parties defendant, whether matured or inchoate in said land; said deed to be made subject, when made by the defendants or by said commissioner, to a mortgage for Ten Hundred Twenty Dollars (\$1020.00) being a certain mortgage dated January 26th, 1900, recorded in Book 35, Page 110, executed by John F. Watson and wife to Horatio N. Woodard, and interest yet due thereon; and the title upon the execution of said deed or deeds in either event provided for, is hereby quieted, and confirmed and approved in said C. E. Herrick and D. B. Stevens and the counter claim and cross petitions of the defendants are dismissed, and upon the issuance and delivery of the deed or deeds herein provided for, it is ordered that a writ of possession issue from this Court for the possession of said land to C. E. Herrick and D. B. Stevens without further proceedings; the Nine Hundred (\$900.00) money to be deposited by Herrick and Stevens may be drawn by Sargeant and Lahr by depositing deed from F. A. Lahr and wife and Chas. Sargeant to C. E. Herrick and D. B. Stevens conveying all interest on said land obtained by them by conveyance by John Watson and wife to them; and judgment for the costs of this action is hereby entered against the defendants in the sum of One Hundred Twenty Three and 45-100 Dollars to each and all of which defendants duly at the time excepted.

(Signed)

A. D. BAILIE,
Presiding Judge.

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Notice of Appeal.

On the 23rd day of May, 1907, the defendants Charles Sargeant, F. A. Lahr and Mrs. F. A. Lahr, and Sargeant and Lahr perfected their appeal to the Supreme Court of the State of Iowa, from the judgment and decree of the District Court entered and rendered in this cause, by serving upon the plaintiffs and appellees and their attorney of record F. H. Helsell, a notice of appeal, and upon C. S. Weaver, Clerk of the District Court of Clay County Iowa, and the notice of appeal was also served upon John Watson and his wife Eva Watson in the following manner: Under and pursuant to the provisions of law, an application was presented to the Hon. A. D. Bailie, one of the judges of the District Court of Clay County, Iowa, supported by affidavit that personal service could not be made upon John Watson and Eva Watson in the State of Iowa, and that the said Watson and wife are non-residents of the United States of America, and they were not represented by counsel in this case, and that thereupon the said Hon. A. D. Bailie made an order that the notice of Appeal in this case be served upon the said John Watson and his wife Eva Watson by publishing such notice for two successive weeks in the "Spencer Herald" and said notice was thereupon

published for two successive weeks in said "Spencer Herald" a newspaper published in Spencer, Clay County, Iowa; and proof of said publication was by the publishers of said newspaper duly and legally filed in the office of the Clerk of the District Court of Clay County, Iowa, on the 17 day of June, A. D. 1907.

HEALY & HEALY,
Attorneys for Appellants and Defendants.

We hereby certify that the cost of printing the above and foregoing abstract is in the sum of \$—.

HEALY & HEALY,
Attorneys for Appellants.

114 To the above named appellees:

You are hereby notified that the appellants, upon the submission of this cause to the supreme court of the State of Iowa, will orally argue the same.

HEALY & HEALY,
Attorneys for Appellants.

115 In the Supreme Court of the State of Iowa.

SARGEANT and LAHR, CHARLES SARGEANT, FRANK A. LAHR., and
Mrs. FRANK A. LAHR, Plaintiffs in Error,

vs.

HERRICK and STEVENS, C. E. HERRICK and D. B. STEVENS, JOHN
Watson and Mrs. John Watson, His Wife, Defendants in
Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Supreme Court of the State
of Iowa:

Because in the records and proceedings as also in the rendition of a judgment in a plea which is in the said Supreme Court of Iowa, before you at the September Term 1908 Thereof, between Herrick and Stevens, C. E. Herrick and D. B. Stevens, John Watson and Mrs. John Watson, his wife, Plaintiffs and Appellees, and Sargeant and Lahr, Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr, Defendants and Appellants, a manifest error has happened to the great damage of the said above named defendants as by this complaint appears. We being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at
116 the City of Washington, D. C., and filed in the office of the
Clerk of the United States Supreme Court on or before thirty
days from the date hereof, to the end that the record and proceed-

ings aforesaid being inspected that the United States Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of January, A. D., 1909.

Done in the City of Des Moines, Iowa, with the seal of the Circuit Court of the United States for the District of Iowa attached.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
*Clerk of the Circuit Court of the United
States, So. District of Iowa,*
By ROMA WOODS, *Deputy.*

Allowed January Jan. 13th, 1909.

W. D. EVANS,
*Chief Justice of the Supreme Court
of the State of Iowa.*

117 [Endorsed:] Filed Jan. 13, 1909. H. L. Bousquet, Clerk
Supreme Court.

118 In the Supreme Court of the State of Iowa.

SARGEANT and LAHR, CHARLES SARGEANT, FRANK A. LAHR, and
Mrs. FRANK A. LAHR, Plaintiffs in Error,

vs.

HERRICK and STEVENS, C. E. HERRICK and D. B. STEVENS, JOHN
Watson and Mrs. John Watson, His Wife, Defendants in
Error.

Know all men by these presents:

That we, Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr, as principals, and C. W. Edgington and Will E. Campbell as surety, are held and firmly bound unto Herrick and Stevens, C. E. Herrick and D. B. Stevens, John Watson and Mrs. John Watson, his wife, in the sum of Five Hundred Dollars to be paid said obligees and their successors, representatives and assigns, the payment of which well and truly to be made, we bind ourselves, heirs, executors, administrators by these presents.

Sealed with our seals and dated this eighth day of January, A. D., 1909.

Whereas, the above named Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr, plaintiffs in error, hath prosecuted the writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled actiet by the supreme court of the State of Iowa.

Now, Therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ of error

to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

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FRANK A. LAHR,
MRS. FRANK A. LAHR,
CHARLES SARGEANT,
Principals.
WILL E. CAMPBELL,
C. W. EDGINGTON,
Surety.

Signed, sealed and delivered in presence of

T. J. STEPHENSON,
H. S. VAN ALSTINE,
Witnesses.

STATE OF IOWA,
Clay County, ss:

On this 9th day of January, A. D., 1909, personally appeared before me Frank A. Lahr and Mrs. Frank A. Lahr, to me known to be the persons described in and who executed the foregoing bond, and acknowledged the execution of the same to be their voluntary act and deed.

[Notarial Seal, E. Taggart, Iowa.]

E. TAGGART,
Notary Public, Clay County, Iowa.

STATE OF IOWA,
Pocahontas County, ss:

On this eighth day of January, A. D., 1909, personally appeared before me Charles Sargeant, to me known to be the identical person described in and who executed the foregoing bond, and he acknowledged the execution of the same as his voluntary act and deed.

[Notarial Seal, L. H. Van Alstine, Gilmore City, Iowa.]

L. H. VAN ALSTINE,
Notary Public in and for Pocahontas County, Iowa.

120 STATE OF IOWA,
Pocahontas County, ss:

I, C. W. Edgington and Will E. Campbell each for himself on oath depose and say that I am a resident and citizen of Pocahontas County, Iowa; that I own real estate and other property located in said county, that is worth the value of two thousand dollars, and that the same is not exempt from execution.

WILL E. CAMPBELL,
C. W. EDGINGTON.

STATE OF IOWA,
Pocahontas County, ss:

On this eighth day of January, 1909, before me personally appeared the above named C. W. Edgington and Will E. Campbell and

who being by me first duly sworn, depose and say that he is the above named surety, and he acknowledged the execution of the above and foregoing bond and affidavit to be his voluntary act and deed for the purposes therein expressed.

[Notarial Seal, L. H. Van Alstine, Gilmore City, Iowa.]

L. H. VAN ALSTINE,

Notary Public in and for Pocahontas County, Iowa.

121 STATE OF IOWA,
Pocahontas County, ss:

I, F. M. Starr hereby certify that I am the Clerk of the District Court of Pocahontas County, Iowa, and that if the above and foregoing bond signed by Charles Sargeant and Frank A. Lahr and Mrs. Frank A. Lahr as principals and Will E. Campbell and C. W. Edgington as surety, were presented to me for approval and acceptance that I would accept and approve the same; and that I further consider and certify that the said bond is a good and sufficient bond for and in the penal sum of Five Hundred Dollars.

F. M. STARR,

Clerk of the District Court of Pocahontas County, Iowa.

The Above Bond is approved.

Dated, Des Moines, Iowa, this 13 day of January, A. D. 1909.

W. D. EVANS,

Chief Justice of the Supreme Court of the State of Iowa.

122 {Endorsed:} Bond. Filed Jan. 13, 1909. H. L. Bousquet, Clerk Supreme Court.

123 In the Supreme Court of the State of Iowa.

HERRICK and STEVENS, C. E. HERRICK and D. B. STEVENS, JOHN Watson and Mrs. John Watson, His Wife, Plaintiffs, Defendants in Error,

vs.

SARGEANT and LAHR, CHARLES SARGEANT, FRANK A. LAHR and Mrs. FRANK A. LAHR, Defendants, Plaintiffs in Error.

Petition for Writ of Error to the Supreme Court of the United States.

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Iowa in rendering judgment against them in the above entitled case, the plaintiffs in error Sargeant and Lahr, Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr, hereby pray a writ of error from said decision and judgment to the Supreme Court of the United States.

Assignment of errors herewith.

HEALY & HEALY,

Attorneys for Plaintiffs in Error.

124 In the Supreme Court of the State of Iowa.

HERRICK and STEVENS, C. E. HERRICK and D. B. STEVENS, JOHN Watson and Mrs. John Watson, His Wife, Plaintiffs, Defendants in Error,

VS.

SARGEANT AND LAHR, CHARLES SARGEANT, FRANK A. LAHR and Mrs. FRANK A. LAHR, Defendants, Plaintiffs in Error.

Assignment of Errors.

Now come the above named plaintiffs in error, and file herewith their petition for writ of error and show that there are errors in the record and proceedings in the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignment of errors.

The above named plaintiffs in error claim title to the premises herein described under and by virtue of the laws and Acts of Congress and the rights, privileges and immunities created, existing and enforceable under and by virtue of the laws of Congress. The validity of said laws, rights, privileges and immunities were denied by the defendants in error in said cause, and were drawn in question by the plaintiffs in error on the ground that the right and title of the plaintiffs in error in and to said described premises was vested in them under and by virtue of the laws and Acts of Congress and of the rights, privileges and immunities created by the Constitution of the United States and by the laws of Congress.

125 The Supreme Court of the State of Iowa committed errors in rendering its judgment and decision in the above entitled cause of action in the following particulars, to-wit:

1. It was error for said court to hold and determine that the tax deed issued by the Treasurer of Clay County, Iowa, to W. L. Simmons and recorded in Book K. of Deeds on page 41 thereof, in the office of the Recorder of Clay County, Iowa, was a valid and legal deed and created, passed or conveyed any title or interest in the East one-half of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section Eleven (11) Township Ninety-four (94) North, Range Thirty-five (35) West of the 5th P. M., Iowa, because the title, both legal and equitable, to said premises was at the time of the issuance of said deed, and at all times prior thereto, in the United States.

2. It was error for said court to hold and determine that the plaintiffs in error Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr were not the absolute and unqualified owners of the said above described premises by reason and by virtue of said above named plaintiffs in error being the owners of said premises in a direct and unbroken chain of title from the United States to them.

3. It was error for said court to hold and determine that the equitable title to the above described premises passed from the United States at any time prior to the year 1904, at the time the

patent was issued by the United States for the above described premises.

4. It was error for said court in said cause to hold and determine that any title, either legal or equitable, had passed from the United States to the above described premises, at the time of, or at any time prior to the issuance and execution of the said above described tax deed by the treasurer of Clay County, Iowa, for the above described premises.

126 5. It was error for said court to hold and determine that any tax was valid or legal that was levied or assessed upon or against said premises above described at any time until the lapse of three years from and after the issuance of the patent by the United States for the above described premises in the year 1904.

6. It was error for said court to hold and determine that the said patent issued by the United States in the year 1904 was obtained and procured through fraud and misrepresentation.

7. It was error for said court to hold and determine that said patent issued for said premises in the year 1904 by the United States was void and of no effect.

8. It was error for said court to hold and determine that the Act of Congress known as the Military Bounty Land Act of March 3, 1855, did not prohibit and prevent the levy of any tax or assessment against said premises until the year 1907.

HEALY & HEALY,
Attorneys for Plaintiffs in Error.

STATE OF IOWA,
Pocahontas County, ss:

I, Charles Sargeant on oath depose and say that I am one of the above named plaintiffs in error; that I have read the above and foregoing petition for writ of error and assignment of errors, know the contents thereof, and the statements therein contained are true, as I verily believe; that I am authorized and instructed by my co-plaintiffs in error herein to make this verification.

CHARLES SARGEANT.

Subscribed and sworn to before me by the said Charles Sargeant on this 8th day of January, A. D., 1909.

[Notarial Seal of L. H. Van Alstine, Gilmore City, Iowa.]

L. H. VAN ALSTINE,
Notary Public in and for Pocahontas County, Iowa.

127 In the Supreme Court of the State of Iowa.

SARGEANT and LAHR, CHARLES SARGEANT, FRANK A. LAHR, and
Mrs. FRANK A. LAHR, Plaintiffs in Error,

vs.

HERRICK and STEVENS, C. E. HERRICK and D. B. STEVENS, JOHN
WATSON and Mrs. JOHN WATSON, His Wife, Defendants in Error.

Prayer for Reversal.

The Plaintiffs in Error, Sargeant and Lahr, Charles Sargeant, Frank A. Lahr, and Mrs. Frank A. Lahr, respectfully pray that the final judgment of the Supreme Court of the State of Iowa, dated December 19, 1908, be reversed and set aside, and a judgment be entered in said cause in favor of the plaintiffs in error Sargeant and Lahr, Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr, and for all costs.

HEALY & HEALY,

Attorneys for Plaintiffs in Error.

128 In the Supreme Court of the State of Iowa.

SARGEANT and LAHR, CHARLES SARGEANT, FRANK A. LAHR, and
Mrs. FRANK A. LAHR, Plaintiffs in Error,

vs.

HERRICK and STEVENS, C. E. HERRICK and D. B. STEVENS, JOHN
WATSON and Mrs. JOHN WATSON, His Wife, Defendants in Error.

Order for Issuance of Writ of Error.

STATE OF IOWA,
Supreme Court:

Let the writ of error issue upon the execution of a bond by Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr, with approved surety, to the defendants in error named in the foregoing petition in the sum of Five Hundred Dollars, said bond when approved to act as a supersedeas.

Dated at Des Moines, Iowa, this 13th day of January, A. D. 1909.

W. D. EVANS,

*Chief Justice of the Supreme Court
of the State of Iowa.*

129 [Endorsed:] Filed Jan. 13, 1909. H. L. Bousquet, Clerk
Supreme Court.

130 In the Supreme Court of the State of Iowa.

SARGEANT and LAHR, CHARLES SARGEANT, FRANK A. LAHR, and
Mrs. FRANK A. LAHR, Plaintiffs in Error,

vs.

HERRICK and STEVENS, C. E. HERRICK and D. B. STEVENS, JOHN
WATSON and Mrs. JOHN WATSON, His Wife, Defendants in Error.

The President of the United States to Herrick and Stevens, C. E. Herrick and D. B. Stevens, John Watson and Mrs. John Watson, his wife:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Iowa, wherein Sargeant and Lahr, Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Iowa this 13th day of January, A. D., 1909.

W. D. EVANS,

*Chief Justice of the Supreme Court
of the State of Iowa.*

Attest:

[Seal of the Supreme Court of Iowa.]

H. L. BOUSQUET,

Clerk of the Supreme Court of Iowa.

131 SIOUX RAPIDS, IOWA, *January 25th, 1909.*

I, Frank H. Helsell, attorney of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

F. H. HELSELL,

Attorney for Defendants in Error.

132 [Endorsed:] Filed Jan. 13, 1909. H. L. Bousquet, Clerk
Supreme Court.

133 Record 28, Page 57.

Clay D. C.

No. 25651.

HERRICK & STEVENS et al.

vs.

SARGEANT and LAHR et al., App'l'ts.

MARCH 10TH, 1908.

Cause continued.

Record, 28, Page 115.

Clay D. C.

No. 25651.

HERRICK & STEVENS et al.

vs.

SARGENT & LAHR et al., App'l'ts.

MAY 13TH, 1908.

Cause submitted on the abstracts and argument on file and the oral arguments of counsel.

Record 28, Page 228.

Clay D. C.

No. 25651.

HERRICK & STEVENS

vs.

SARGENT & LAHR et al., App'l'ts.

DEC. 15TH, 1908.

Cause submitted on appellants' petition for rehearing.

Record 28, Page 237.

Clay D. C.

No. 25651.

HERRICK & STEVENS

vs.

SARGENT & LAHR et al., App'l'ts.

DEC. 19TH, 1908.

App'l'ts' petition for rehearing having been fully considered is overruled.

134 Be it remembered that on the 29th day of September, 1908, the following among other proceedings were had in the Supreme Court of Iowa, to-wit:

Opinion Record No. 3, Page 346.

No. 25651.

HERRICK & STEVENS and Others

vs.

SARGENT & LAHR and Others, Appellants.

Appeal from Clay District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellants pay the costs of this appeal, taxed at \$19.75 and that execution issue therefor.

135

Filed Sept. 29th, 1908.

Supreme Court of Iowa.

25651.

HERRICK & STEVENS and Others, Appellees,

vs.

SARGENT & LAHR and Others, Appellants.

Appeal from Clay District Court.

Hon. A. D. Bailie, Judge.

Action in Equity to Quiet Title to a Tract of Land. Decree for Plaintiffs, and Defendants Appeal.

Healy & Healy, for Appellants.

F. H. Helsell, for Appellees.

136 WEAVER, J.:

The pleadings in this case are voluminous, if not confusing. The abstract of appellants sets forth a "Petition," an "Amended and Substituted Petition," an "Amendment to the Substituted Petition," "Answer, Cross-Petition, Cross-Bill, and Counterclaim," "Answer to Cross-Petition," "Reply to Cross-Petition," "Answer to Cross-Petition and Counterclaim," "answer to Cross-Petition and Cross-Bill and Counterclaim," "Reply to to the Answer and Cross Petition of the Plaintiff," closing with a document entitled "Amendment to Answer to the defendants' Cross-Petition and Counterclaim and as Amendment to the Cross-Petition and as a Reply to the Amendments of the Defendants Filed Since Last Term of Court."

This competitive contest between the pleaders, extending from March 6, 1903, to October 27, 1905, seems to demonstrate that the determination to have the last word is a characteristic not peculiar to the sex against which it has often been charged. The history of the title to the land in controversy may be set out as follows: A soldier's land warrant which had been issued to one Jacob Hutson and assigned to one Schaffer was located upon the tract June 15, 1857, and record of the entry made in the proper office. On February 6, 1885, Schaffer and wife made a quitclaim deed to the land to G. W. Patterson, who, in turn, deeded to M. E. Griffin who deeded to Ainsworth, who deeded to Simmons; the last-named deed being made April 15, 1885. On February 11, 1889, Schaffer, for some reason, made another quitclaim to Patterson. In 1889 Simmons deeded the land back to Ainsworth, who, in 1894, conveyed the land by warranty deed to Richardson. On October 28, 1896, Richardson conveyed to Ainsworth, and on January 3, 1901, the latter conveyed to John Watson, who is or was one of the plaintiffs in this action. It should also be said that, before Ainsworth deeded to Simmons on July 10, 1885, the latter had obtained a tax deed for the land on a sale made in 1875 for the delinquent taxes of the year 1873, so that his subsequent grantees obtained whatever title said deed conveyed, as well as such title as had been obtained through the succession of conveyances from Schaffer. Watson and wife went into possession of the land, making their home thereon under his contract of purchase a considerable time before the title was conveyed to him. In April, 1900, Watson, then being in possession, received \$5 from the defendants Sargent & Lahr, giving them a writing, acknowledging its receipt as "part payment on the east half of the southeast quarter of section 11-94-35, Greenfield township, Clay County, Iowa, balance to be paid when abstract is furnished." This receipt was signed by John Watson alone. The purchase price was not stated, nor is any time fixed in which the sale was to be consummated. On January 26, 1901, Watson, his wife joining, entered into a written contract with Sargent & Lahr for the sale of the land for \$2,223, of which \$5 was acknowledged to have been paid down, the further sum of \$1,295 to be paid on delivery of possession March 1, 1902, and the remainder to be paid by the assumption of an existing mortgage upon the property. Watson also undertook to perfect the title by March 1, 1902, and Sargent & Lahr agreed to a forfeiture of their rights under the contract if payments were not made strictly in accordance with the agreed terms. On June 13, 1902, Watson and wife, claiming that the foregoing contract had been abandoned, entered into a contract with the plaintiffs Herrick & Stevens to sell said land to them for \$2,020, of which \$100 was paid down, the further sum of \$900 to be paid on delivery of possession March 1, 1903, and the remainder to be satisfied by the assumption of the existing mortgage debt. On February 26, 1903, the same parties made a supplemental contract, by which it was agreed that F. C. Gilchrist, Esq., should proceed to quiet and settle the title to the land in a manner satisfactory to the parties, and that the costs of the proceedings should be borne by them in equal shares, and, in the

event that the title should not be settled satisfactorily, the vendees had the option to surrender the contract and receive a return of the advance payment. On March 3, 1903, seven days after the
138 date of this supplemental agreement, Watson, under their promise to protect him in so doing, united with his wife in making a warranty deed of the land to Sargent & Lahr. Soon thereafter this action was instituted in the name of John Watson and wife and Herrick & Stevens as plaintiffs against Sargent & Lahr as defendants to quiet their title to the farm.

It is the claim of the plaintiffs that whatever rights the defendants may have obtained under their contracts above-mentioned were abandoned by them, and that defendants by their representations and conduct are estopped from now asserting any claim to the land adverse to the plaintiffs. In addition to such rights as they may have obtained under their contracts and deed aforesaid, defendants assert title to the land wholly independent of Watson, and this title they trace as follows: It will be remembered as we have already stated, that the land warrant was located on the tract and entry made on June 15, 1857, by one Schaffer, from whom the Watson title (omitting now any reference to the tax deed) is traced. So far as shown, this entry was never canceled or set aside, but it appears that on February 24, 1858, Schaffer assigned his certificate of location to Amos Stanley, and authorized him to receive the patent. No patent was ever issued to any person until since the commencement of this action, when one was procured as will be hereinafter shown. On August 11, 1870, Stanley and wife conveyed by warranty deed to S. V. Landt, and on February 7, 1872, Landt conveyed to Hirma Balliett, a resident of Pennsylvania. Balliett died intestate, and, if he had ever conveyed the land during his lifetime, the deed does not appear of record, nor is there any one in court claiming under a title so derived. After the contracts by Watson to both Sargent & Lahr and Herrick & Stevens had been made, and the strife thus inaugurated was in progress, Sargent & Lahr appear to have discovered the heirs of Hiram Balliett, and procured a deed by which the defendants became vested with whatever interest or title said heirs had to convey. On February 8, 1904, when this action had been pending nearly a year, F. A. Lahr and Charles Sargent filed with the Commissioner of the General Land Office their affidavits that they were then the absolute and unqualified owners of the
land located by Schaffer on June 15, 1857, and that they had
139 acquired all of the interest of said Schaffer and all other persons who had or claimed any interest in said land, and asked to be permitted to make a cash substitution for the location by warrant, and that patent issue accordingly in the name of Sargent & Lahr, or in the name of Amos Stanley. On February 15, 1904, said defendants paid the sum of \$100 to the receiver of the land office at Des Moines, Iowa, and received from the register of said office a certificate reciting that, in pursuance of law, Amos Stanley had purchased the land in question at the rate of \$1.25 per acre, and had paid said sum in full, and that the said Amos Stanley was entitled to receive a patent for the land described. On September

14, 1904, a patent was issued in the name of Amos Stanley. Relying both upon their claim of title thus derived through Stanley, and upon their conveyances from Watson of the title derived through Schaffer independent of Stanley, defendants resist the claim of the plaintiffs, denying the allegations made by the plaintiffs as grounds of estoppel. It will be recalled that Watson, who entered into the contract and supplemental contract for the sale of the land to defendants, and later made a contract and supplemental contract for the sale of the same land to Herrick & Stevens, and authorized a suit to be brought to quiet the title against defendants, within a week thereafter deeded the land to defendants, and three days later appeared as coplaintiff herein to quiet the title against his own conveyance to the defendants.

The next step which we need mention in this game, in which Watson appears to have been assigned to the role of shuttlecock, was as follows: On the same day on which the petition herein was filed Watson, who had received some money from defendants in consideration for his deed of March 3, 1903, removed to Wisconsin, and thereafter, on August 13, 1903, defendants' counsel prepared and procured Watson and wife to execute a dismissal of the suit as to them, filing with such dismissal a statement that they never authorized the use of their names as plaintiffs, whereupon Herrick & Stevens amended the petition, making Watson and wife defendants. As a witness Watson first swore that he had no recollection of ever signing the paper dismissing the suit, but finally remembered
140 that he had executed it at the request of defendants, but did not know its real purport, except that defendants informed him there was trouble over the land, and they needed such instrument. He repeats, however, that he neither employed nor authorized any one to file said paper in the district court. The trial court, after hearing the evidence, found that the contract under which defendants' title through Watson originated had been abandoned by the parties thereto prior to the contract given by Watson to plaintiffs, and that the deed thereafter made by Watson to defendants was received by them with full notice and knowledge of the outstanding contract between Watson and wife and the plaintiffs, and that said conveyance was so obtained with the fraudulent intent to prevent the completion of the sale to plaintiffs. A decree was entered setting aside and canceling the deed to defendants, who were ordered to convey the title so obtained to the plaintiffs. It was also adjudged that the patent from the United States issued in the name of Stanley was procured by the fraud and misrepresentation of the defendants, and the same was held to be of no effect against the rights of the plaintiffs. Other provisions of the decree are not material on this appeal.

1. We will first consider as briefly as possible, the equities as between plaintiffs and defendants under their several contracts and dealings with the pliable Watson. It is true that defendants' contract was of prior date, and Herrick & Stevens had both constructive and actual notice that such agreement had been made. Being prior in time, defendants were prior in right, unless it be also shown

that they had abandoned the purchase before the date of the contract with plaintiffs, or unless their conduct with reference thereto was such as to estop them from asserting any claim to the land against the plaintiffs. The deed procured by the plaintiffs from Watson after the scramble began cuts no material figure in the case; for, if the defendants are not in position to rely on their contract of January 26, 1901, a title procured from Mr. Watson after the contest began, and with knowledge of the plaintiffs'

141 claim, would be subject to such claim in their hands precisely as it would in the hands of their grantor. Though the evidence is by no means conclusive, we are disposed to agree with the trial court in finding that the defendants are not in position to insist upon the priority of their contract. The plaintiff Herrick testifies that defendants, or at least one of them, informed him they had thrown up the contract with Watson, and that on March 1, 1902, when said contract matured, they had told Watson they would not go on with it. He further says that, when he learned the contract had been recorded, he applied to the defendants, asking them to quit claim the land in order to clear the title, and they promised so to do. On another occasion he says that Watson in his hearing reminded the defendant Lahr of the agreement to quitclaim, and asked him why he did not do so, and Lahr replied "because there is more money in it for us not to." These statements are denied by defendants, but plaintiffs' version is strongly corroborated by Mr. Gilchrist, who says that he applied to Mr. Lahr for a quitclaim to the plaintiffs, and Lahr admitted they had promised to quitclaim, but said they had now obtained additional rights in the land. He further stated, according to this witness, that they—defendants—claimed nothing under the Watson title, and that said title did not amount to anything. Quite significant, also, of the attitude of the defendants with reference to this land in 1902, is the testimony of one Bronlee, who, holding a claim for collection against Watson, applied to Sargeant & Lahr, who were collection agents for the house represented by the witness, for information as to the possibility of obtaining payment. Lahr informed the witness that Watson had sold his farm to Herrick & Stevens, and advised the witness to see Watson, and get an order from him on Herrick & Stevens. In pursuance of this suggestion, Lahr took the witness out to Watson's place, and advised the latter to settle the claim in the manner suggested. On the following day Watson made the order which was presented to, and accepted by, Herrick & Stevens. The order was made payable on March 1st, when the contract for sale to Herrick & Stevens would mature, and was left by the witness in the possession of Sargeant & Lahr for collection. This conduct on de-

142 fendants' part is not only consistent with the theory that they had not abandoned all claim to the land under their contract with Watson, but is quite inconsistent with the idea that they were then asserting any right or claim thereunder. Without extending this opinion to recite all of the testimony and circumstances bearing upon this feature of the case, we have to say we are reasonably satisfied that defendants, either because they thought there

was no profit in the land under their contract, or because they believed they could get an independent title at less cost, did abandon the thought of taking title from Watson until some time after the latter had entered into the contract to convey to the plaintiffs.

2. We have next to consider whether the line of conveyances from Stanley to Landt and the Balliet heirs to the defendants constitutes an independent title paramount to the title which plaintiffs obtained or contracted for from Watson. If this depended solely on the comparative validity and effect of the deed by Schaffer, the entryman, to Patterson, and the deed by Stanley, assignee of the certificate of location, to Landt it might be a question of some doubt whether the latter would not be preferred in equity. But, as we have seen, a tax title to the property was obtained by Simmons before he received conveyance of the Schaffer title, and this title through intermediate conveyances became vested in Watson before the making of the contract by him to the plaintiffs. If, therefore, this tax deed was valid, it became the foundation of a new and independent title from the state, and a determination of the relative rights of Stanley and Schaffer and their several grantees is unnecessary. The appellants deny the validity of the tax title, because, as they say, neither the legal nor equitable title to the land had passed from the United States at the time the taxes for which the sale was made were assessed and levied, and because under the statutes of the United States land located under a soldier's warrant is exempt from taxation for a period of three years after the issue of patent therefor. We are of the opinion it is not correct to say that the equitable title to this land had not passed from the United States at the time these taxes accrued. The warrant held by Schaffer was located in 143 the year 1857, and from that date either Schaffer, the entryman, or Stanley, the assignee of the certificate of location, was entitled to receive a patent from the United States. While the legal title remained in the United States, it was so held for the benefit of the person who at the date of the location was the holder of the warrant or for the assignee or grantee of such person. From the date of the location the land ceased to be a part of the general domain of the government open to purchase or settlement by any one, and the legal title was thereafter held by the government as in the nature of a trust for the use of the person showing himself entitled to the benefit of said location. The fact which is made to appear, that the formal approval of the location and issuance of the patent were suspended because of apparently conflicting assignments of the warrant, does not affect this conclusion. The officers of the government were not denying the right of the holder to locate the warrant on this land; but, in view of the fact that the original holder appeared to have made two assignments of it, further action was suspended until the apparent conflict of rights thus created could be removed. The rights of the locator in the premises do not date from the time when he succeeded in removing the cloud but from the date when the location was actually made. It is the well-established doctrine that he who has the right to property, and is not excluded from its enjoyment, shall not be per-

mitted to use the legal title of the government to avoid his just share of taxes. *Railroad Co. v. Price*, 133 U. S. 496, 40 Sup. Ct. 341, 33 L. Ed. 687. And the fact that patent is suspended during some investigation or controversy concerning the rights of the person claiming such patent does not necessarily prevent the application of this rule. *Railroad Co. vs. Patterson*, 154 U. S. 130, 14 Sup. Ct. 977, 38 L. Ed. 934; *Maish v. Arizona*, 164 U. S. 609; 17 Sup. Ct. 193, 41 L. Ed. 567; *Loan & Trust Co. v. Railroad Co.* (C. C.) 76 Fed. 15.

The case of *Witherspoon vs. Duncan*, 71 U. S. 210, 18 L. Ed. 339, is in principle quite parallel with the one before us. There the government had provided for the donation of certain lands to settlers who had been required to vacate other lands ceded to an

Indian tribe. A party entitled to locate a claim under this 144 provision did so, and received the receipts of the register and receiver of the land office, but for some reason the issuance of

patent was suspended or delayed. Meanwhile another person entered the land, and obtained a certificate therefor. Before the patent finally issued upon the first entry, a tax title had been obtained by a third person. This title was held good. The court there overruled the same argument now advanced in behalf of the appellants, and say: "In no just sense can lands be said to be public lands after they have been entered at the land office and certificate of entry obtained. If public lands before the entry, after it, they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first were authorized by law, confers no right on the buyer, and is a void act. * * *

The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make a proper conveyance as soon as it can, and, in the meantime, it holds a naked legal fee in trust for the purchaser who has the equitable title." See, also, *Carroll vs. Safford*, 44 U. S. 441, 11 L. Ed. 671.

The patent title to the land in question, whether it is traced through the Schaffer conveyance as appellees contend, or through the Stanley conveyance, as appellants contend, rests on the Schaffer entry in 1857, and from that date the land became subject to assessment and taxation, and the tax deed to Simmons, therefore, passed a good title, unless this result is avoided by the effect of the exemption by which, under the laws of the United States, lands given as bounty for military service shall, while they continue to be held by the patentee, be exempt from taxation by any state or municipal authority for the term of three years from and after the date of the patent issued therefor. As the patent in this case did not issue until the year 1904, it is argued that a tax title resting upon an assessment and levy made long before that date must be held void. It is to be observed, however, that, while this land was located under a soldier's warrant, it was not located by the soldier himself. He sold his right to make the entry to Schaffer, but the exemption from taxation was in the nature of a personal privilege which did

not pass with the right of entry to his assignee. This we
145 have repeatedly ruled in other decisions involving like ques-
tions. See *Long vs. Olson*, 115 Iowa, 388, 88 N. W. 933,
and cases there cited. No other objection to the validity of the
tax deed is raised by the defendants, and we see no escape from
the conclusion that it passed a good title to the grantee therein
named.

4. It follows from the conclusions announced in the foregoing
paragraphs of this opinion that the findings of the district court
must be affirmed, unless the patent which defendants procured to
be issued pending this litigation operates in some way to strengthen
their position and give them a claim upon the title. But we see no
logical or equitable ground upon which to base such a holding.
The patent was issued not to Sargent & Lahr or either of them,
but to Amos Stanley, and they can obtain no right nor title by
virtue of such patent, except as they are able to trace it through
said patentee. That title has been eliminated by tax sale and deed.
So far, then, as the record discloses Watson's title was good against
the world, and as we have already held that appellees' contract
for the purchase of the land from Watson must prevail over the
contract and deed made to the appellants, it follows that the decree
of the trial court cannot be disturbed.

Counsel severely criticise that provision of the decree which finds
that the patent was procured by fraud, and declares that instrument
void. We are of the opinion that whatever may have been the
intent of appellants in making the representations complained of in
procuring the issuance of the patent their conduct in that respect
did not operate as a fraud upon the appellees. It was to their in-
terest to have the patent issued either to Schaffer or Stanley. In
either event, the passing of the legal title from the government
related back to the date of the entry in 1857, and served to remove
all doubt as to the taxable character of the property after that date,
thus affirming the sufficiency and efficacy of the tax deed. There
was no occasion, we think, for declaring the patent void, but, as
the appellants are not prejudiced thereby, and the appellees did not
appeal, we are not inclined to modify the decree in that respect.
If, as counsel seem to think, the decree in this respect is a mere
brutum fulmen without effect upon the existence or validity
146 of the patent, then no one is harmed.

The decree of the district court is affirmed.

Exhibit "B."

147 In the Supreme Court of the State of Iowa.

SARGENT and LAHR, CHARLES SARGENT, FRANK A. LAHR, and Mrs.
FRANK A. LAHR, Plaintiffs in Error,

vs.

HERRICK & STEVENS, C. E. HERRICK, and D. B. STEVENS, JOHN
WATSON and Mrs. JOHN WATSON, His Wife, Defendants in Error.

THE UNITED STATES OF AMERICA,
State of Iowa, ss:

Return of Clerk on Writ of Error.

I, H. L. Bousquet, Clerk of the Supreme Court of Iowa, in pursuance of the command of the Writ of error in the above entitled cause to which this certificate is attached, do hereby certify and return that the above and foregoing is a true and correct transcript of the record, opinion, and final judgment of this court, in the case of Sargent and Lahr, et al., plaintiffs in error, against Herrick & Stevens, et al., Defendants in error, as full, true, and complete as the same are now of record, and on file in my office.

I further certify that the assignment of Errors, Bond, Petition for allowance of Writ of Error and Citation with return of Service and acceptance thereon and prayer for reverseal are hereto attached in original form, true and correct copies of same being retained on file in this office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court this 28th day of January, A. D. 1909.

H. L. BOUSQUET,
Clerk Supreme Court of Iowa.

[Seal of the Supreme Court of Iowa.]

Endorsed on cover: File No. 21511. Iowa Supreme Court. Term No. 149. Sargeant & Lahr, Charles Sargeant, Frank A. Lahr and Mrs. Frank A. Lahr, plaintiffs in error, vs. Herrick & Stevens, C. E. Herrick, D. B. Stevens, John Watson and Mrs. John Watson, his wife. Filed February 11th, 1909. File No. 21511.

FILE NO. 21511.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

No. 149.

SARGENT & LAHR, CHARLES SARGENT AND F. A.
LAHR, AND MRS. F. A. LAHR, *Plaintiffs*
in error,

vs.

HERRICK & STEVENS, C. E. HERRICK, AND E. B.
STEVENS, JOHN WATSON AND MRS.
JOHN WATSON, *Defendants in*
error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

This Cause comes to this Court upon a writ of error to the Supreme Court of the State of Iowa. The plaintiffs in error felt aggrieved by the decision of the Supreme Court of the State of Iowa in a cause which was determined by said Court wherein these plaintiffs in error were the defendants and appellants, and wherein these defendants in error were the plaintiffs and appellees. The case is found reported in 140 Iowa, p. 590.

In the month of April, 1900, one John Watson claimed to be the owner of the East Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$) of Section Eleven (11), Township Ninety-four (94) North, Range Thirty-five (35) West of the 5th

P. M., in Clay County Iowa; and on said date contracted to sell said land to the plaintiffs in error. On January 26th, 1901, said Watson and these plaintiffs in error entered into a more formal contract for the purchase and sale of said premises and on March 1st, 1903, Watson and wife by warranty deed conveyed the premises in dispute to the plaintiffs in error. Subsequent to January, 1901, and prior to March, 1903, Watson also executed a contract whereby he agreed to convey said premises to the defendants in error. The defendants in error, after Watson and wife had conveyed the premises to the plaintiffs in error, instituted this cause in the District Court of Clay County, Iowa, to quiet title against Watson and wife and against these plaintiffs in error.

The above described land was located on June 15th, 1857, under a Military Land Bounty Warrant, which warrant was issued under the Act of Congress of March 3rd, 1855. Under the provisions of this act and amendments thereto, this land was not subject to assessment or taxation for a period of three years after the issuance of the patent. Said Warrant, which was numbered 27,622, was located by Hartzell I. Shaffer upon the above described premises at the Sioux City, Iowa, Land office. (Transcript p. 32.) When the location was returned to the Interior Department it was suspended for the reason that there were two assignments of the Warrant from Hutson, the warrantee, and no relinquishment from the first assignee. (Transcript p. 38.) It appears that Jacob Hutson, the warrantee, had duly assigned said Warrant to one William Maltby about April 14th, 1856, and that about February, 1857, he had duly assigned the same Warrant by a second assignment to the said locator, Hartzell I. Shaffer. (Transcript p. 20.) On the 24th day of February, 1858, Schaffer assigned his certificate of location to Amos Stanley (Transcript p. 32), authorizing him to receive the patent therefor. On

September 7th, 1875, the Interior Department surrendered and delivered up this Warrant to R. W. Walker of Washington, D. C., who was the attorney for Amos Stanley. Walker had previously, on March 7, 1871, filed with the Interior Department the register's duplicate certificate which was properly assigned by the locator to Amos Stanley. This certificate was surrendered by the Interior Department to Walker for the purpose of having the assignment perfected, and neither the Warrant nor the assignment was ever thereafter returned to the Interior Department. (Transcript p. 38.) Because of this inability of Stanley and his attorney to clear up the question of two assignments, the one to Maltby and the other to Stanley's assignor, Schaffer the locator, the Interior Department refused to issue a patent to him.

On August 11, 1870, Amos Stanley and wife by warranty deed conveyed the premises to S. V. Landt; on February 7, 1872, Landt and wife by warranty deed conveyed to Hiram Balliett; and March 21st, 1903, the heirs of Balliett conveyed by quit claim deed to these plaintiff in error.

Rule Forty-One (41) of the Department of the Interior, published July 20, 1875, reads as follows:

"When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issuance of a patent by filing in the office for the district in which the land is situated, an acceptable substitute for the said warrant. The substitute must be made in the name of the original locator and may consist of a warrant, cash or any kind of script legally applicable to the class of lands embraced in the entry."

In 1904, the plaintiffs in error, acting under the foregoing rule of the Interior Department, made application for the issuance of a patent and tendered a cash substitute of One Hundred (\$100.00) Dollars for the Warrant which had been

rejected when tendered by Stanley; and the patent was issued in 1904 for said land in the name of Amos Stanley.

In September, 1878, the Treasurer of Clay County, Iowa, issued a tax deed for said premises to W. L. Simmons. The land was sold on February 5th, 1875, for the taxes for the year 1873.

For some reason which does not appear in the record, Shaffer, the locator who had assigned his certificate to Amos Stanley on February 24, 1858, made two quit claim deeds to the land in favor of G. W. Patterson, one of which deeds was dated February 6th, 1885, and the other one July 10th, 1885; March 23, 1885, Patterson deeded to M. E. Griffin; March 30th, 1885, Griffin deeded to O. C. Ainsworth; April 15th, 1885, Ainsworth deeded to W. L. Simmons, the holder of the tax title. On February 11th, 1889, Simmons deeded back to Ainsworth; September 22nd, 1894, Ainsworth deeded to D. Hartley Richardson; October 28th, 1896, Richardson deeded to Ainsworth; January 3, 1901, Ainsworth deeded to John F. Watson; and on March 1st, 1903, Watson and wife by warranty deed conveyed to the plaintiffs in error.

It was the claim of the plaintiffs in error in the Iowa Courts that the tax deed was absolutely void, because neither the legal nor equitable title to the land passed from the government until the year 1904. The quit claim deeds of Schaffer, the entryman, to Patterson were void, also, because Schaffer had previously assigned his interest to Stanley, and in 1885 he had no color of title to deed away. Such title as may spring from this tax deed to Simmons and the quit claim deed to Patterson, the plaintiffs in error, claimed to have received from Simmons' remote grantee, Watson, by the deed of March 1st, 1903. But the plaintiffs in error base their claim to title to the land in dispute in this Court only upon the unbroken chain from the original locator Schaffer through the Balliett heirs and the patent issued in 1904 in the name of Schaffer's assignee, Amos Stanley.

The Supreme Court of Iowa held in this cause that the tax title of 1878 was valid notwithstanding the fact that the Interior Department refused to accept the Warrant when it was tendered in payment for the land in 1857 because of the fraudulent assignment thereof, and notwithstanding the fact that the patent was not issued until 1904.

ASSIGNMENT OF ERRORS.

The errors relied upon for a reversal of the judgment of the Supreme Court of Iowa are as follows:

1. It was error for said Court to hold and determine that the tax deed issued by the Treasurer of Clay County, Iowa, to W. L. Simmons and recorded in Book K of Deeds on Page 41 thereof in the office of the Recorder of Clay County, Iowa, was a valid and legal deed and created, passed or conveyed any interest in the land in dispute, because both the legal and equitable title to said premises was at the time of the issuance of said deed and at all times prior thereto vested in the United States.

2. It was error for the Court to hold and determine that the plaintiffs in error were not the absolute and unqualified owners of said premises by virtue and by reason of the plaintiffs in error being the owners of said premises in a direct and unbroken chain of title from the United States.

3. It was error for said Court to hold and determine that the equitable title passed from the United States at any time prior to the year 1904, at which date the United States issued the patent for the above described premises.

4. It was error for the Court to hold and determine that any title, legal or equitable, to said premises had passed from the United States at or prior to the time of the issuance of the tax deed.

5. It was error for the Court to hold and determine that any tax was valid or legal that was assessed against said premises at any time before a period of three years had elapsed from the issuance of the patent.

6. It was error for the Court to hold and determine that the patent issued by the United States in the year 1904 was obtained through fraud and misrepresentation.

7. It was error for the Court to hold and determine that the patent issued for said premises in the year 1904, was void.

8. It was error for the Court to hold and determine that the act of Congress known as the Military Bounty Act of March 3, 1855, did not prohibit or levy any tax or assessment against said premises until the year 1907.

BRIEF.

1. This action to quiet title was brought in the Iowa Court by the defendants in error. The plaintiffs in error have been in possession of the land in dispute since 1903. The plaintiffs in an action to quiet title must succeed, if at all, on the strength of his own position, and not on the weakness of the position of his adversary.

Empire Mtge. Co. v. Beechley, 137 Ia., 7, 11, 114 N. W. 556;

Cody v. Wiltse, 130 Ia. 139, 106 N. W. 510;

Koch v. West, 118 Ia., 468, 92 N. W. 663;

Costello v. Burke, 63 Ia. 361.

2. The claim of the defendants in error is based upon the validity of the tax title acquired by Simmons in 1878 and the quit claim deeds of Schaffer to Patterson in 1885.

3. The quit claim deeds of Schaffer conveyed no interest in the land because

1st. Schaffer had previously assigned his interest in said land to Stanley in 1858. (Transcript p. 32.)

2nd. The certificate of location of Schaffer was invalid because based upon a fraudulent assignment of the said Bounty Land Warrant. Said Warrant had been assigned to Maltby before it was assigned to Schaffer. (Transcript p. 20.) Maltby's rights were therefore prior to Schaffer's.

4. The Tax title acquired by defendants in error through Simmons and his grantees is invalid for the following reasons:

1st. In determining the rights of a purchaser under a tax sale, the maxim, "*Caveat emptor*", is rigidly applied as against the purchaser at such a sale.

Holt's Heirs' Lessee v. Hemphill's Heirs, 3 Ohio, 232;

Braxton v. Rich, 47 Fed. Rep. 178;

Games v. Dunn, 39 U. S. 322, 10 L. Ed. 476.

Stead's Executors v. Course, 4 Cranch 403, 2 L. Ed. 660.

2d. A tax sale of public land which is exempt from taxation conveys no title to the purchaser.

Young v. Charmquist, 114 Ia., 116;

McGoon v. Scales, 76 U. S. 23, 19 L. Ed. 545;

Bonner v. Phillips, 77 Ala., 427;

Hall v. Dowling, 18 Cal. 619;

People v. U. S., 93 Ill. 30, 34 Am. Rep. 155;

McCaslin v. State, 99 Ind. 428;

Braxton v. Rich, 47 Fed. Rep. 178.

3d. The assignment of the Warrant to Schaffer by Hutson was fraudulent; and where the warrant or the assignment thereof upon which land is located is fraudulent, the locator obtains no such equitable title to the land as will subject the land to taxation. In other words, the government retains such an interest in the land as exempts it from taxation.

Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41 L. Ed. 664;
U. P. Ry. Co. v. McShane, 22 Wall. 444;
K. P. Ry. Co. v. Prescott, 16 Wall. 603;
Bronson v. Kukuk, 3 Dill. 490, Fed. Cas. No. 1929;
Pitts v. Clay, 27 Fed. 635;
Calder v. Keegan, 30 Wis., 126;
Kohn v. Barr, 52 Kan. 269;
Reynolds v. Plymouth Co., 55 Ia., 90;
Durham v. Hussman, 88 Ia., 29;
Topeka Com. Security Co. v. McPherson, 7 Okl. 332, 54 Pac. Rep. 489;
State of Minn. v. Itaska Lumber Co., 111 N. W. Rep. 276;
Sjohi v. Dreschel, 19 U. S. 564, 50 L. Ed. 311.

4th. The Courts hold that even where lands have been earned by a railroad company under a congressional grant, but to which there are conflicting claims, and the legal title to which is still in the United States, such lands are not taxable.

Dickerson v. Yetzer, 53 Ia. 681;
Grant v. Iowa R. Land Co., 54 Ia. 673;
Doe v. Iowa R. Land Co., 54 Ia., 657;
Campbell v. Spears, 120 Ia., 670;
Central Pac. R. Co. v. Howard, 52 Cal. 227.

5th. Where the deed or patent is suspended because there is a contest pending in the land office between claimants the land is not subject to taxation.

Topeka Com. Security Co. v. McPherson, 7 Okla. 332, 54 Pac. 489;
Clearwater Timber Co. v. Shoshone Co., Idaho, 155 Fed. Rep. 612.

5. Neither the legal nor the equitable title to the land in question passed from the government so as to subject said land to taxation until the issue of the patent to plaintiffs in error in 1904. This title rightfully related back to the as-

signment to Stanley, but this is "solely for the purposes of justice" and not to validate the tax title.

Gibson v. Chouteau, 13 Wall. 92;

Grant v. Iowa R. Co., 54 Ia. 673, 677;

Clearwater Timber Co. v. Shoshone Co., Idaho, 155

Fed. Rep. 612, 625;

Reynolds v. County of Plymouth, 55 Ia. 93;

Calder v. Keegan, 30 Wis. 126.

6. The patent to the land in question was not obtained from the United States Land Office by fraud for the following reasons:

1st. At the time the affidavits of these plaintiffs in error were made which the defendants in error allege are fraudulent (Transcript pp. 54 and 55) said plaintiffs in error had already acquired the interests of the Balliett heirs. (Transcript p. 45.)

2nd. Before the affidavits referred to in the last paragraph were made said plaintiffs in error had acquired the interests of John F. Watson. (Transcript p. 63.)

3rd. The Supreme Court of Iowa in their opinion in this case (Transcript p. 86) say:

"We are of the opinion that whatever may have been the intent of appellants in making the representations complained of in procuring the issuance of the patent their conduct in that respect did not operate as a fraud upon the appellees."

ARGUMENT.

This was an action to quiet title brought in the Iowa Court by the defendants in error. Under the Iowa law this is a statutory action in equity. It is provided for in Sections 4223 to 4227 of the Code of Iowa, annotated, of 1897. In this, as in many other states of the union, where the action is statutory, the following rule prevails:

"THE PLAINTIFF IN AN ACTION TO QUIET TITLE MUST SUCCEED, IF AT ALL, ON THE STRENGTH OF HIS OWN POSITION AND NOT ON THE WEAKNESS OF THE POSITION OF HIS ADVERSARY."

The Supreme Court of Iowa has frequently announced this rule in cases that came before it. The case of *Empire Mortgage Company vs. Beechley* was an action in equity to quiet title to certain lots in the city of Cedar Rapids. The case was decided in 1908. The opinion of the Court was written by Judge Weaver who wrote the opinion in this cause. In the course of his decision he remarked:

"It is, of course, an established rule that the plaintiff in such an action must recover, if at all, on the strength of his own position and not on the weakness of the position of his adversary."

In *Koch vs. West*, 118 Ia., 468, which was an action brought to quiet title, the Court say:

"The relief asked by the plaintiff Koch is based on the ground that he is the owner of the fee title of the land in controversy. The allegations of his petition must, therefore, be proven, and if he has failed in this respect he is not entitled to judgment."

The case of *Costello vs. Burke*, 63 Ia. 361, was brought by the plaintiff to quiet title to certain lands in Dallas County, Iowa, in 1884. At page 364 of the opinion the Court say:

"Plaintiff alleged that he was the owner in fee simple of the premises from which a portion of the land sought to be appropriated was taken. All of the allegations of his claim under the provision of Section 941 were regarded as denied in all the subsequent proceedings. This puts on him the burden of proving every fact material to his claim."

In the Iowa Courts the defendant in error based their claim to the land in question upon the validity of the tax title acquired by Simmons in 1878 and upon the quit claim deeds of Schaffer to Patterson in 1885. Schaffer executed these quit claim deeds twenty-seven years after he had assigned all his interests in and all his claim to the lands in question to Stanley. During all that period he had made no claim to the land. But the quit claim deeds of Schaffer conveyed no interest in the land for another reason,—the certificate of location upon which Schaffer at this time based his claim was invalid because it was procured on a fraudulent assignment of the said Bounty Land Warrant.

Hutson had assigned the said Warrant to one Maltby almost a year before making the assignment to Schaffer; and that assignment had never been cancelled. Upon the principle, therefore, that where the equities are equal the one prior in time prevails, Maltby's rights were superior to Schaffer's. A right based upon a quit claim deed is not entitled to protection against prior equities. *Steele v. Bank*, 79 Iowa, 339; *Wickam v. Henthorn*, 91 Iowa, 242. All facts here related are admitted by the defendants in error in an amendment to their answer to the plaintiffs in error's cross-petition filed in the District Court of Iowa on the 27th day of October, 1905, and given in full in the transcript of record at page 20.

Again the tax title upon which the defendants in error base their claim, derived through Simmons and his grantees, is invalid for the following reasons:

1. "IN DETERMINING THE RIGHTS OF THE PURCHASER UNDER A TAX SALE THE MAXIM *caveat emptor* IS RIGIDLY APPLIED AS AGAINST THE PURCHASER AT SUCH A SALE."

This proposition of law is supported by numerous decisions in both State and Federal Courts. The rule was announced by this Court as far back as 1808.

In the case of *Stead's Executors vs. Course*, 4 Cranch 403, 2 L. Ed. 660, which was a bill in equity brought to set aside as fraudulent a deed of land made by a collector of taxes, Chief Justice Marshall said:

"The validity of the sale is the subject of controversy and its validity depends on the authority of the collector to sell, and on the fairness of the transaction. It would be going too far to say that a collector selling land with or without authority could by his conveyance transfer the title of the rightful proprietor. He must act in conformity with the law from which his power is derived and the purchaser is bound to inquire whether he has so acted."

In 1827 in the case of *Lessee of Holt's Heirs vs. Hemphill's Heirs*, 3 Ohio 233, the Supreme Court of Ohio, citing the above case approvingly, says:

"A collector who sells lands for taxes must act in conformity with the law from which he derives his power; and the purchaser is bound to inquire whether he has done so or not. He buys at his peril and cannot sustain his title without showing the authority of the collector and the regularity of the proceedings. In these cases the maxim, *caveat emptor*, applies."

2. A TAX SALE OF PUBLIC LAND WHICH IS EXEMPT FROM TAXATION CONVEYS NO TITLE TO THE PURCHASER.

This familiar rule of law needs no argument to support it. It has been announced by this Court in the case of *McGoon vs. Scales*, 76 U. S. 23, 19 L. Ed. 545, and in many other cases. It is followed in *Young vs. Charmquist*, 114 Ia. 116; *Bonner vs. Phelps*, 77 Ala. 427; *Hall vs. Dowling*, 18 Cal. 619; *People vs. U. S.*, 93 Ill. 30; 34 Am. Rep. 155; and *McCaslin vs. State*, 99 Ind. 428.

3. THE ASSIGNMENT OF THE WARRANT TO SCHAFER BY HUTSON WAS FRAUDULENT, AND WHERE THE WARRANT OR THE ASSIGNMENT THEREOF UPON WHICH LAND IS LOCATED IS FRAUDULENT THE LOCATOR OBTAINS NO SUCH EQUITABLE TITLE TO THE LAND AS WILL SUBJECT THE LAND TO TAXATION. IN OTHER WORDS, THE GOVERNMENT RETAINS SUCH INTEREST IN THE LAND AS EXEMPTS IT FROM TAXATION."

We rest our right to a reversal of the judgment of the Supreme Court of Iowa in this cause largely upon the rule announced above. This rule has frequently been announced by this Court and it has been adhered to by the Courts in many states. In fact the case of *Hussman vs. Durham*, decided by this Court in 1896, 165 U. S. 144, 41 L. Ed. 664, is decisive of the rights of the parties hereto.

The *Hussman* case came to this Court from the Supreme Court of Iowa, and the facts in that case are remarkably similar to the case at bar. We quote from the statement of facts found in the report:

"On May 19th, 1859, Robert Craig located Bounty Land Warrant No. 27911, issued to William Long under the Act of Congress of March 3rd, 1855, upon the land in controversy and obtained from the proper land officer a certificate of location. This certificate was recorded in the office of the Recorder of Carroll County, the county in which the land was situated. No patent was issued thereon. On February 1st, 1864, the Secretary of Interior cancelled the Land Warrant under authority of an act of Congress under date of June 3, 1860. This Act provided that when any land warrant was lost or destroyed, whether the same had been sold or assigned by the warrantee or not, the Secretary of the Interior should cause a new warrant to be issued, which new warrant should have all the force and effect of the original and upon such action the original warrant was to be deemed and held to be null and void, and any assignment thereof fraudulent; and further that no patent shall ever issue for any land located therein unless such presumption of fraud in the assignment is removed by due proof that the same was executed by the warrantee in good faith and for valuable consideration. * * * * It was alleged in that petition filed in this case that the assignment on the warrant purporting to be that of the warrantee was a forgery and this allegation was admitted by the defendant. * * * * Nothing was done either in the local land office or in the Land Department at Washington to formally cancel the certificate of location. Up to the year 1886 the record of the Land Department showed on its face a full equitable title passing to Robert Craig by virtue of his certificate of location and payment therefor in a Land Warrant. During these years the land was subjected to taxation by the officers of Carroll County, Iowa, and was sold for non-payment of taxes and the titles under such tax sale passed to Hussman, the defendant below. In 1886 William H. Durham, plaintiff below, having obtained conveyance from Craig applied to the Land Department for leave to purchase the land upon payment of the legal price. This application was granted upon authority under Rule 41 of the Department of Interior published on July 20th, 1875. * * * * The money, \$150.00, was paid by Durham in 1888 and a patent issued under date October 3, 1889, to Robert Craig, his heirs and assigns."

Mr. Justice Brewer wrote the opinion of the Court, and he said:

"On the merits of the case we remark that while it is undoubtedly true that when the full equitable title has passed from the Government, even prior to the issuance of patent conveying the legal title, the land is subject to legal taxation."

Carroll v. Safford, 44 U. S., 3 Howard 441, 11 L. Ed. 671.

Witherspoon v. Duncan, 71 U. S., 4 Wall 210, 18 L. Ed. 339.

Yet until such equitable title has passed and while the land is still subject to the control of the Government it is beyond the reach of the state's power to tax. (Citing authorities.) Therefore the validity of the tax deeds held by plaintiff in error depends on the question whether the equitable title to the land had passed from the Government to Craig. * * * * Neither can it be said that on the issuance of a patent the title or relation always dates of the time when the certificate of location was issued. A title by relation extends no further backward than to the inception of the equitable right. If no equitable right passed by the surrender of the Land Warrant and the Certificate of Location in 1858 but only by the payment of money in 1888, the legal title created by the issue of the patent has no relation back to this latter day. In other words, the United States does not part with its rights until it has actually received payment, and if by mistake, inadvertence or fraud, a Certificate of Location which is equivalent to a receipt is issued, when in fact no consideration has been received, no equitable title is passed thereby and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid. These views have been recognized in Iowa as elsewhere. Thus in *Reynolds vs. Plymouth Co.*, 55 Ia. 90, * * * The case therefore stands in this way: Confessedly, though a formal Certificate of Location was issued in 1858, there was then in fact no payment for the land and the Government received nothing until 1888. During these intervening years whatever might have appeared upon the face of the record, the legal and equitable title both remained in the Government. The land was therefore not subject to state taxation. Tax sales and tax deed issued during that time were void. The defendant took nothing by such deeds."

In the case at bar in 1857, Amos Stanley tendered to the Government in payment for the location of land a Bounty Warrant that he claimed had been assigned to him. The Government determined that the tender of this Warrant constituted no payment on Stanley's part because Stanley's title to the Warrant was not established to the satisfaction of the Interior Department, because a previous assignment for the same Warrant was, at the time of the tender in 1857, in existence. Stanley acquiesced in this decision of the Interior Department and never did anything further to complete the contract for the purchase of this land. The title, both legal and equitable, to the land in dispute was in the General Government. This title could only be divested by purchase or upon some other basis that was satisfactory to the United States.

Schaffer attempted to purchase this land. The first step in the act of purchase was the location which took place in 1857. Location alone did not give any title, legal or equitable, to Schaffer. The title could not be divested in the absence of a completed contract between the Government and Schaffer or Schaffer's assignees. Stanley then comes upon the scene, claiming to be the assignee of Schaffer. Stanley seeks to obtain title to the land and tenders in payment therefor the Certificate of Location and Military Bounty Land Warrant. The Government found and determined that the tender of payment was not a valid tender, and refused to proceed further with the contract of Purchase. There is no doubt or question but that the officers of the Interior Department had this right. They had the same right to refuse to accept a forged or fraudulent warrant, assignment or certificate of location that they had to refuse counterfeit money, if it were tendered in payment of the land.

Johnson v. Toxlesley, 80 U. S. 485.

French v. Fyan, 93 U. S. 169.

Rogers Locomotive Machine Works v. Am. Emigrant Co., 76 U. S. 95.

Stanley and Schaffer abandoned all further attempts to complete the contract. Stanley never thereafter made or asserted any claim or interest in the land unless it be the fraudulent and fictitious one of conveying an interest in the land which in fact he never possessed. The United States never thereafter recognized any right or claims of Stanley in the land. So the title both legal and equitable remained in the Government until the year 1904.

At the time the plaintiffs in error, who became the successors in interest of the holders of the tax title and also were the holders of the interest of those who acquired the real or apparent interest of Stanley, made application to the Government to obtain title to the land, in the year 1904 neither the legal nor equitable title had passed from the Government. The patent issued in 1904. The Government had received no compensation whatever for its legal and equitable interest in the land until the year 1904. The contract or purchase was not complete until 1904. Stanley was at no time entitled to the patent. This is not a case where the locator or his assignee had done everything that could be done prior to the actual passing of the legal title, and the legal title is withheld through oversight or neglect of the officers of the Government; but rather is this a case where nothing was done prior to 1904 to obtain any title, legal or equitable, to the land in controversy.

In an able opinion of this Court announced by Mr. Justice Miller in 1874, in the case of *Union Pacific Railroad Company vs. McShane*, 22 Wall. 444, 22 L. Ed. 747, it is said:

“That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the Government, can admit of no doubt. Until this is done the equitable title of the company is incomplete. It remains a payment to be paid to perfect it. There is something to be done without which the company is not entitled to a patent. The case clearly is not within the rule which authorizes state

taxation of lands, the title of which is in the United States.

The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent for the purpose of securing the payment of these expenses. And it cannot be permitted to the states to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation, and the title would pass to the purchaser."

The above case grew out of an attempt of certain Counties of Nebraska to tax land which had been granted to the Union Pacific Railroad Company under the Act of 1864, extending the grant to twenty miles on each side of the road, and providing that before any of the land granted shall be conveyed to the company, there shall first be paid into the treasury of the United States the cost of surveying, selecting and conveying the same by the Railroad Company.

If the foregoing premises and conclusions are correct, then, of course, the tax title of Simmons was void because the land was not subject to taxation in that at all times prior to 1904, the land in dispute belonged to the general government. For that reason the tax deed of 1878 created and conveyed absolutely no title or interest whatever.

We urged upon the attention of the Supreme Court of Iowa, the case of *Hussman vs. Durham*, *supra*, and it is significant that in the very elaborate opinion filed by the Supreme Court of Iowa in this cause no reference whatever is made to that case. We are familiar with the rule frequently announced by this Court that if the purchaser of land from the Government has done all that he can do and all that he is required to do to perfect his interest in the land, then he has such an interest in the real estate as to subject it to taxation. Of course, we do not question or quarrel with this rule, but until the contract of purchase is complete and until the purchaser has done everything that he is required to do or

can do to complete the contract of purchase, the title remains in the United States.

Railway Co. v. Rockne, 6 Sup. Ct. Rep. 201.

The identical question we now urge upon the attention of the Court arose in the case of *Pitts vs. Clay*, 27 Fed. Rep. p. 635. The opinion is by Judge Shiras. We quote therefrom as follows:

"The evidence shows that on the 2nd day of June, 1857, Jesse Williams located Bounty Land Warrant No. 60801 upon the premises in dispute in the United States Land Office at Sioux City, and received a duplicate Certificate of Location in the usual form. On the 30th of May, 1857, two days before the location of the warrant by Jesse Williams the Commissioner of Pensions had addressed a letter to the Commissioner of the General Land Office requesting that officer to withhold the issuance of the patent upon Warrant No. 60801 upon the ground that the assignment was a forgery. Upon the 19th of June, 1863, the Commissioner of the Land Office addressed a letter to the register of the local office at Sioux City requesting him to inform Jesse Williams that the Commissioner of Pensions had cancelled Warrant No. 60801 for forgery in its assignment and in the papers on which its issuance was obtained, and further stated that, as it was to be presumed that Jesse Williams had bought the Warrant in good faith and had no connection with the fraud, he could secure the issuance of the patent by substituting a valid Warrant or by making a re-entry for cash. On the 4th of November, 1870, Williams furnished Warrant No. 113546, which was substituted for No. 60801, and on the 8th of March, 1871, the patent was issued to him.

The first question to be determined is whether under this state of facts the land could be legally subjected to taxation by the state and county authorities prior to the 4th of November, 1870; for if the United States had such an interest in it up to that time as prohibited taxation under the laws of that state, it followed that the tax deeds are all void, they being based upon assessments made prior to the year 1870.
* * * * It still appears that the General Land Office refused to grant a patent upon the location made of that war-

rant and required either the substitution under another warrant or a re-entry for cash. * * * * To sustain defendant's theory that Williams had fully established his equitable title by locating warrant No. 60801, it must appear that the same was a valid warrant. There is no direct evidence in the case upon that question. The Department refused to recognize it as a valid instrument and Williams acquiesced in such a decision. This Court certainly cannot be asked to reverse such action upon the part of the department without cogent evidence of its invalidity even if the power so to do exists under any circumstances. In fact the equitable title in Williams was not perfected until the substituted Warrant was furnished. Until that was done it was wholly uncertain whether Williams would ever pay for the land, and until a valid warrant was substituted or the money was paid, it cannot be said that Williams had perfected a valid title to the land. Until the substituted Warrant was furnished the payment for the land was not made. And until payment was made the United States had an interest in the land which debarred the state from taxing the same, and hence the tax deeds founded upon taxes assessed prior to the year 1870 must be held to be invalid and void."

Judge Shiras wrote the foregoing opinion ten years prior to the time that the case of *Hussman vs. Durham* was decided by this Court, and the rule announced in *Pitts vs. Clay*, *supra*, has found the approval of your Honors in the case of *Hussman vs. Durham*.

In the case at bar the Interior Department refused to recognize the warrant tendered by Stanley in 1857 as a valid warrant. Stanley acquiesced in this decision. The equitable title did not pass from the Government until 1904. Until 1904 it was not known that anyone would ever tender or pay to the Government any valid consideration for the land, but substituted payment was finally made in 1904, and then for the first time did the United States receive any consideration for the land or did it part with any interest in the same.

When the land office refused to accept Stanley's assignment on the ground that such assignment was fraudulent it

was incumbent upon Stanley to establish the validity of his claim. This he never did, and not having done so the equitable title to the land did not pass from the government to him nor to his grantees.

Railroad Co. v. Rockne, 6 Sup. Ct. Rep. 201, cited above.

In the opinion of the Supreme Court of Iowa, rendered in this cause (transcript p. 84.) Judge Weaver, speaking for the Court, said:

"The warrant held by Schaffer was located in the year 1857, and from that date either Schaffer, the entryman or Stanley, the assignee of the certificate of location, was entitled to receive a patent from the United States. While the legal title remained in the United States, it was so held for the benefit of the person who at the date of the location was the holder of the warrant or for the assignee or grantee of such person. From the date of the location the land ceased to be a part of the general domain of the government open to purchase or settlement by any one, and the legal title was thereafter held by the government as in the nature of a trust for the use of the person showing himself entitled to the benefit of said location. The fact which is made to appear, that the formal approval of the location and issuance of the patent were suspended because of apparently conflicting assignments of the warrant, does not affect this conclusion. The officers of the government were not denying the right of the holder to locate the warrant on this land; but, in view of the fact that the original holder appeared to have made two assignments of it, further action was *suspended* until the apparent conflict of rights thus created could be removed. The rights of the locator in the premises do not date from the time when he succeeded in removing the cloud but from the date when the location was actually made."

In thus holding the Iowa Court differs from the repeated rulings of this Court and also from the decisions in many of the State Courts. The facts in the case of *Calder v. Keegan*, 30 Wis., 126, are analagous to the facts in this case, but

the Wisconsin Court, basing its opinion upon the decisions of this Court, reaches an exactly opposite conclusion. The facts of the Wisconsin case as stated in the report are as follows:

"It appeared in evidence that the land in controversy was located at the Mineral Point land office, by one Ansley, July 24, 1854, and that on the 16th of January, 1856, the certificate of location was assigned to the plaintiff Calder as trustee of Mary Jane Bramwell. After the certificate of location was issued and before the year 1867, but at what precise time does not appear, the issuing of the patent was suspended at the general land office in Washington, on the ground that the warrant on which the land was located had been issued on fraudulent papers. It was shown that the practice of the land office was not to cancel locations in such cases, but to hold them in suspension for a reasonable time, extending in the meantime to the locator or his assignee the privilege of making good the spurious land warrant, either by remedying the defect in the transfer of the warrant located, or by furnishing a substitute warrant of the same denomination and free from objection, or by payment of the cash price of \$1.25 per acre in lieu of the warrant. It was also shown that on the 3d of June, 1867, a patent was duly issued to Calder for the land in question, he having made good the consideration by payment of the cash price. In 1860 the land was assessed for taxes, and in 1861, it was sold by the treasurer of Green County, and on September 21, 1864, one James Smith, grantor of defendant, received a tax deed; under which he went into possession, made improvements and afterwards conveyed to defendant. The action was tried before the court without a jury; finding for plaintiff and judgment accordingly, from which defendant appealed."

Dixon, C. J., wrote the opinion of the Court. He said:

"This land belonged to the United States at the time the supposed taxes were levied, and so was not liable to taxation. It was a case of suspended entry under a spurious land warrant, where, under the practice, as shown by the letters of the commissioner of the general land office, contained in the record, no title whatever passed to the locator or to his as-

signees of the certificate until the same was actually paid for, either by the substitution of another and a valid warrant of the same denomination, or the substitution of cash for the warrant at the rate of \$1.25 per acre. After suspension, which was merely for the purpose of giving the locator due notice and reasonable time to pay for the land as above stated, and before cancellation of the entry, the title was held by the United States, subject to be acquired in that way by the locator or his assignees, of the certificate, as a matter of mere grace or favor to him or them. There was no contract relation between the United States and the locator by which the United States was bound to sell him the land or to issue a patent therefor to him or his assigns, on payment or tender of the money or of another land warrant of the same denomination. In such case it seems idle to talk about the locator having any taxable interest in the land, or that the title of the United States was any more subject to be interfered with by the state power of taxation, than if no steps whatever had been taken by the government towards a sale or disposition of it."

In harmony with the view of the Wisconsin Court is the opinion of Judge Dietrich in *Clearwater Timber Co. v. Shoshone County*, Idaho, 155 Fed. Rep. 612. In this case a railroad company which owned patented lands within national forest reserves conveyed the same to the United States, and selected public lands in lieu thereof, as permitted by statute. Thereafter it executed a deed to the lands so selected to the plaintiff, but several years elapsed before such selections were approved by the Land Department. Meanwhile the defendant county attempted to tax said lands, but the Court held that "the equitable title does not vest in the selector, and hence he has no title which is subject to taxation by the state, until the selection is approved by some authorized officer of the government." That is, while the patent is suspended for cause, the equitable title does not pass from the government.

In the case at bar there were two claimants to the Warrant upon which the land in dispute was located and which was never finally delivered to the United States. These two

claimants were Maltby, to whom the warrant was first assigned, and, Schaffer, the locator. Until the officers in the Land Department decided which of these claimants was the rightful owner both the legal and equitable title to the land remained in the government. Just such a case as this arose in the Supreme Court of Oklahoma. *Topeka Com. Security Co. v. McPherson*, 7 Okl. 332, 54 Pac. Rep. 489. The question before the Court is stated in the report of this case as follows:

"Are lots in a government town site in this territory subject to sale for taxes levied and assessed against said lots while contests are pending in the land office between occupying claimants, and before deeds issued by the town-site trustees?"

It was contended that the "primary disposal of the soil", as required by statute, was embraced in and covered by the patent to the town-site trustees. To this contention the Court replied:

"In our view, the 'primary disposal' of the lands of the United States means their disposal by the officers or agents of the government to some person who, having the qualifications to acquire such lands, and who has complied with the terms of the law therefor, is entitled to conveyance thereof by patent or deed, without any reserved authority in the government or its officers to withhold the same."

And after discussing and quoting the cases of *Railroad Co. v. Prescott* and *Railway Co. v. McShane*, cited *supra*, the Supreme Court of Oklahoma proceeds:

"The doctrine of these cases, as we interpret them, is that, where something remains to be done before a party seeking to acquire title from the government to a part of the public domain is entitled to a conveyance of such land, the title, whether it be legal or equitable, cannot be divested by the

state in the exercise of the right of taxation. Applying the principles of these cases to the case at bar they leave no ground for the upholding of the taxation here sought to be enforced. At the time the tax deed in question was executed, the land department had not yet determined, under its power to determine, that there was any claimant who was a rightful claimant for said lots."

This case is to be distinguished from those railroad cases, such as *Iowa Homestead Co. v. Webster Co.*, 21 Iowa, 221, in which it was held that land, embraced within a railroad land grant, becomes taxable upon being earned by the company, notwithstanding the legal title may not have passed from the United States. In *Dickerson v. Yetzer*, 53 Ia. 681, the Supreme Court of Iowa says:

"In our opinion, these cases are applicable only where the legal title is due to the company, and the United States retains it simply because the company has neglected to take the proper steps to obtain it."

In this case Stanley employed an attorney and endeavored to clear his title, but failed no doubt because it was found upon investigation that the assignment to his grantor, Schaffer, was fraudulent. The opinion in *Dickerson v. Yetzer*, *supra*, has been accepted and followed in *Doe v. Iowa R. Land Co.*, 54 Ia. 657; in *Grant v. Iowa Land Co.*, 54 Ia. 673; in *Campbell v. Spears*, 120 Ia. 670; in *Central Pac. R. Co. v. Howard*, 52 Cal. 227; and in many other cases in the various state and federal courts.

The Supreme Court of Iowa said in their opinion in this cause when it was before them (transcript p. 86):

"The passing of the legal title from the government (by the issuance of the patent to the plaintiffs in error, in 1904) related back to the date of the entry in 1857, and served to remove all doubt as to the taxable character of the property

after that date, thus affirming the sufficiency and efficacy of the tax deed."

In our opinion, the above is a singularly erroneous statement of the doctrine of relation. In *Gibson v. Chouteau*, 13 Wall. 92, it was said, "that the doctrine of relation is a fiction of law, adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired equitable claim or right to the title". Certainly there was no privity between Simmons and Stanley. "A tax title is not derivative, but is new and independent of former titles". *Durham v. Hussman*, 88 Ia. 29; and to hold that by reason of the payment of 1904 the equitable title passed forty-seven years ~~before~~ that is contrary to the doctrine of relation. In the case of *Gibson v. Chouteau* cited, *supra*, the Court defines the doctrine of relation as follows:

"By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the Recorder of Land Titles under the Act of Congress. At that time the title of the claimant to the land desired by him, had its inception; and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date." (Citing Authorities.)

In speaking of this doctrine of relation in *Clearwater Timber Co. v. Shoshone County, Idaho*, cited *supra*, the Court

said that "such a doctrine is never applied except when necessary to give effect to an act or instrument, the operation of which would otherwise be defeated." And in *Grant v. The Iowa Railroad Co.*, 54 Iowa, 673, it was said by the Supreme Court of Iowa that: "This doctrine of relation is a fiction intended to subserve the ends of justice in protecting the rights of the claimant of property; it cannot be invoked to defeat rights, or create liability."

We conclude therefore that the doctrine of relation cannot be invoked by the defendants in error in this case, because first: There is no privity existing between said defendants in error and Stanley, the assignee of the original locator.

Secondly: ^{said} because the proceedings to obtain a patent for the ~~amount~~ in question were initiated by these plaintiffs in error.

The defendants in error in this case charged the plaintiffs in error, in the Iowa Courts, of having obtained the patent to the land in dispute, from the United States Government by fraud. In view of the opinion of the Supreme Court of Iowa upon this point we deem it scarcely necessary to enter upon the discussion of the same.

In the opinion referred to (Transcript Page 86) the Court say: "We are of the opinion that whatever may have been the intent of appellants in making the representations complained of, in procuring the issuance of the patent, their conduct in that respect did not operate as a fraud upon the appellees". It seems to us the Court might even have made this statement stronger by saying that the intent of the appellants was not fraudulent, because when said appellants or plaintiffs in error made the representation spoken of in the affidavits accompanying their application for said patent, they had already acquired the interests of the Balliett heirs. They had also acquired the interests of John F. Watson.

We therefore respectfully ask Your Honors to reverse the Judgment of the Supreme Court of Iowa in this cause.

Respectfully submitted,

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